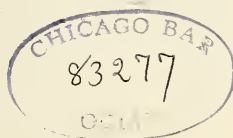


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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:  
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 1

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



*2*  
Macy Adams,  
Defendant in Error,  
-vs-

Error to the circuit court  
of Boone county.

Elgin and Belvidere Electric  
Co.,  
Plaintiff in Error.

NIEHAUS, P. J.

The plaintiff in error operates an interurban electric railway between Elgin and Belvidere; and its lines crosses Warren Avenue, a public street in the city of Belvidere in a nearly easterly and westerly direction. On July 27, 1913, an electric passenger car of the plaintiff in error coming from the east, after entering the city of Belvidere, came into contact with the buggy of the defendant in error at the Warren Avenue crossing. The defendant in error, with her daughter-in-law, Mrs. Miller, on the day in question, was riding in a top buggy driving a single horse, on Warren Avenue, going south, and had just reached the crossing when the buggy was struck, and the impact resulted in breaking one of the wheels of the buggy, smashing the top off the buggy over the occupants, and causing the horse to run away, whereby the defendant in error was injured; and she testifies that she was precipitated partly over the dashboard of the buggy, and one of her legs forced through the bottom of the buggy; that the horse ran away, and lying over the dashboard, bent forward with her head between the whipple tree, her left leg through the bottom and her right leg over the box of the buggy, she hung onto the lines while the horse

Error to the circuit court  
of Boone county.

Defendant in Error,

-v-

Plaintiff in Error.  
Boone Co.,  
Electric

W. H. H.

The plaintiff in error operates an interurban electric  
railway between Elgin and Boliviere; and its lines cross  
Warren Avenue, a public street in the city of Boliviere in a  
nearly westerly and westerly direction. On July 24, 1915,  
an electric passenger car of the plaintiff in error coming from  
the east, after entering the city of Boliviere, came into contact  
with the buggy of the defendant in error at the Warren Avenue  
crossing. The defendant in error, with her daughter-in-law,  
Mrs. Miller, on the day in question, was riding in a top buggy  
driving a single horse, on Warren Avenue, going south, and had  
just reached the crossing when the buggy was struck, and the  
impact resulted in breaking one of the wheels of the buggy,  
causing the top of the buggy over the occupants, and causing  
the horse to run away, whereby the defendant in error was in-  
jured; and she testifies that she was precipitated partly over  
the backboard of the buggy, and one of her legs forced through  
the bottom of the buggy; that the horse ran away, and falling over  
the defendant, sent forward all her load between the wheels  
and, the last leg through the bottom and her right leg was  
the end of the buggy, she hung onto the line while the horse



was running away dragging the demolished buggy for about a block west, when the horse was stopped.

The defendant in error commenced this suit in the circuit court of Boone county to recover damages for the injuries alleged to have been sustained by her. The declaration ~~x~~ filed contains two counts. The negligence charged in the first count against the plaintiff in error is a failure to give a sufficient warning of the approach of its interurban car by ringing a bell or sounding a whistle; and in addition thereto in the second count it is alleged that the car approached the crossing at a high and dangerous rate of speed. To these charges in the declaration the plaintiff in error filed the general issue upon which the case proceeded to a trial by jury. The jury found the plaintiff in error guilty and assessed the damages of the defendant in error at \$2,000; whereupon a motion for a new trial was made, which was disallowed by the court, and a judgment rendered upon the verdict, and from this judgment a writ of error is prosecuted.

A number of matters are assigned as error; but the principal questions raised are, that the evidence is insufficient to support the verdict; that the evidence does not show the negligence charged in the declaration; and that it proves that the defendant in error was guilty of contributory negligence; also that the court erred in its rulings on instructions; and that the damages are excessive.

According to the testimony adduced on the part of the plaintiff in error she and her companion, Mrs. Miller, who was her daughter-in-law, were riding along on Warren Avenue in the buggy, which had the side curtains and back curtains up. She was driving a single horse at a slow trot toward the crossing in

was traveling very slowly and the defendant was about 100 feet west, when the car was stopped.

The defendant is not in the line of sight of the court of common law to recover damages for the injuries alleged to have been sustained by her. The defendant is not entitled to two counts. The negligence charged in the first count against the plaintiff in error is a failure to give a sufficient warning of the approach of the defendant car by ringing a bell or sounding a whistle; and in addition thereto in the second count it is

alleged that the car was moving at a dangerous rate of speed. To the charges in the second count the plaintiff in error filed the general issue upon which the case proceeded to a trial by jury. The jury found the plaintiff

in error guilty and assessed the damages of the defendant in error at \$5,000; whereupon a motion for a new trial was made, which was disallowed by the court, and a judgment rendered upon the verdict, and from this judgment a writ of error is presented.

A number of matters are assigned as error; but the plaintiff in error claims that the evidence is insufficient to support the verdict; and she also does not deny the negligence charged in the first count; and that it proves that the defendant

in error was guilty of contributory negligence. Also that the court erred in its rulings on instructions; and that the damages are excessive.

As to the first assignment of error, it is claimed that the plaintiff in error was not negligent, and that the defendant was negligent; and that the evidence is insufficient to support the verdict; and that the court erred in its rulings on instructions; and that the damages are excessive.

question. When they got to the Moon place, which is on the east side of Warren Avenue, about 150 feet from the crossing, both she and her companion looked and listened for an approaching car, and kept looking almost continuously toward the interurban track, but that their view toward the track, which was to the southeast, was greatly interfered with, and sometimes totally cut off by certain intervening obstructions, some of which were on the Vail place, which was situated toward the east and next to the right of way of plaintiff in error, and on this place there were buildings a dwelling house and barns and out-houses and large trees covered with foliage, and with limbs reaching within seven feet of the ground, as well as a number of small fruit trees, about six or seven feet in height, and on the right of way there was a fence running along the northerly side toward the east, which was four and a half feet high, and covered with morning glories, and on the right of way there were also high weeds and sun flowers and underbrush, and in the midst of the weeds and underbrush there was also a small bushy tree, all interfering with the view of defendant in error toward the interurban track, in the direction from which the car in question was approaching. And the defendant in error and her companion, Mrs. Miller, testify that although they were on the alert and tried to ascertain the approach of any interurban car by looking and listening, they did not hear any warning nor see any approaching car until they were almost on the track; that defendant in error, after having looked toward the east for a car and not noticing any, turned just before getting to the crossing to the west and looked in that direction for a car, and as she turned back to again look to the east she saw it coming and heard three sharp blasts of the



Question. When they got to the moon face, which is on the east side of Warren Avenue, about 100 feet from the crossing, both she and her companion looked and listened for an approaching car, and kept looking almost continuously toward the intersection track, but that both were toward the track, which was to the southeast, was greatly interested with, and somewhat totally cut off by certain intervening obstructions, some of which were on the Vail place, which was situated toward the east and next to the right of way of right-of-way in error, and on this place there were buildings a dwelling house and barns and out-houses and large trees covered with foliage, and with limbs reaching within seven feet of the ground, as well as a number of small fruit trees, about six or seven feet in height, and on the right of way there was a fence running along the northerly side toward the east, which was four and a half feet high, and covered with morning glories, and on the right of way there were also high weeds and sunflowers and underbrush, and in the midst of the weeds and underbrush there was also a small bushy tree, all interfering with the view of defendant in error toward the intersection track, in the direction from which the car in question was coming. The defendant in error and her companion, Mr. Miller, testify that although they were on the left and tried to keep in the track of any intersecting car by looking and listening, they did not hear any warning nor see any approaching car until they were close to the track; that defendant in error, after having looked toward the east for a car but not seeing any, turned just before getting to the crossing to the west and looked in that direction for a car, and as she turned back to look in the east she saw it coming and heard the same sharp whistle of the

whistle. The car at the moment she saw it was almost on the east line of the crossing running at a high rate of speed, and her horse had stepped over the nearest rail; that she immediately pulled the horse around to the right and that the horse quickly turned to the right, and thereby cleared the swiftly approaching car; but that the car nevertheless struck the buggy with the result before stated.

Mrs. Miller, who was with the defendant in error, in the buggy, corroborates her upon all material points, and other witnesses corroborate the defendant in error in some of the details related by her with reference to the manner in which she approached the crossing, and concerning the obstructions which interfered with her view, as to the speed of the car and as to the time when the whistle sounded. The testimony of the defendant in error and her companion, however, are directly in conflict with that of the motor-man and the conductor who had charge of the running of the car; other witnesses also testified for the plaintiff in error and in contradiction of the testimony of the defendant in error.

To determine the question of the weight of the evidence it was necessary to pass upon the credibility of the various witnesses. Counsel for plaintiff in error strongly contends that the witnesses who testified for the plaintiff in error were more worthy of belief than the witnesses for the defendant in error, and that these witnesses really furnished the only reliable evidence in the case and that their testimony should have controlled the jury in arriving at a verdict; and that since it did not so impress the jury it should so impress this court, and that taking the testimony of the witnesses for the plaintiff in error as presenting the facts in the case the verdict is clearly against the weight of the evidence.

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man and the conductor who had charge of the running of the car;  
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and that their testimony should be accepted and they be believed  
at a verdict; and that since it did not so appear the jury is  
should so appear the court, and that being the testimony of the  
witnesses for the plaintiff in error as presented and facts in  
the case the verdict is clearly against the weight of the evidence.



It is a well settled rule, however, the wisdom of which has been repeatedly emphasized by courts of review, that a jury which sees and hears the witnesses is in a better position to pass upon their credibility than a court which reviews only the record; and it is for that reason that it has been considered the acknowledged province of the jury to determine questions of fact which depend on the credibility of witnesses where there is a conflict in the evidence. The jury in this case determined the conflict in the evidence in favor of the defendant in error, and must have done so by believing the testimony of certain witnesses, and we, as a court of review, would not be warranted in saying that they should have accepted the testimony of other witnesses as representing greater or clearer elements of verity. C.C. R. Co. v Bork, 128 Ill. App. 357; 117 Ill.App.315.

Whether or not the employes of the plaintiff in error in charge of the car in question were guilty of the negligence charged in the declaration; whether or not they gave the defendant in error proper and sufficient warning of the approach of the car before it reached the crossing; and whether or not the car was running at a high and dangerous rate of speed in approaching the crossing, considering the conditions that prevailed there, as well as whether or not the defendant in error exercised the care and caution for her safety which a reasonably prudent person would have exercised under similar conditions and circumstances, to avoid injury, were all purely questions of fact for the jury to determine, and the jury having determined them this court would not be justified in saying that they should have been determined differently unless the verdict was manifestly against the weight of the evidence, which we are not warranted in holding for the reasons before stated.

It is a well settled rule, however, the wisdom of which has been repeatedly emphasized by courts of review, that a jury which sees and hears the witnesses in a better position to judge upon their credibility than a court which reviews only the record; and it is for that reason that it has been considered the acknowledged province of the jury to determine questions of fact which depend on the credibility of witnesses where there is a conflict in the evidence. The jury in this case determined the conflict in the evidence in favor of the defendant in error, and must have done so by believing the testimony of certain witnesses, and we, as a court of review, would not be warranted in saying that they should have accepted the testimony of other witnesses as representing greater or clearer elements of verity. *O.C. R. Co. v. Bort, 128 Ill. App. 387; 117 Ill. App. 311.*

Whether or not the employees of the defendant in error in charge of the car in question were guilty of the negligence charged in the declaration; whether or not they gave the defendant in error proper and sufficient warning of the approach of the car before it reached the crossing; and whether or not the car was running at a high and dangerous rate of speed in approaching the crossing, considering the conditions that prevailed there, as well as whether or not the defendant in error excluded the cars and caution for her safety which a reasonably prudent person would have excluded under similar conditions and circumstances, to avoid injury, were all purely questions of fact for the jury to determine, and the jury having determined them the court would not be justified in saying that they should have been determined differently unless the verdict was manifestly against the weight of the evidence, which we are not warranted in holding for the reasons herein stated.



Plaintiff in error contends that error was committed because some of the instructions which were requested on its behalf were refused. Refused instruction No. 1, which is pointed out, is as follows:- " It is not the exercise of ordinary care and prudence for a person to drive with a horse directly on to a railroad crossing, known to her at the time to be dangerous, without making an effort by stopping, or listening, or otherwise, to ascertain whether a car is approaching, or whether it is safe to drive on the track with a horse."

Plaintiff in error insists that because this instruction was held proper in the case of C.& N.R.Ry. Co. v Hatch, 79 Ill. 137, it was proper in this case and should have been given. It appears, however, that the particular facts constituting contributory negligence upon which the instruction was based in the Hatch case were different, and moreover, were undisputed. The alleged negligence in the Hatch case, as stated by the supreme court, "consisted of the running of a train composed of three or four cars and an engine, backwards against a one-horse wagon laden with stoves and cement, belonging to appellee, as it was crossing appellant's track in one of the streets of the city of Chicago. The teamster in charge of appellee's wagon knew that the crossing was dangerous and had been familiar with it for four or five years. \*\*\*\* There is also evidence that the teamster on first seeing the approaching train, and while out of danger, stopped his horse very suddenly throwing him back on his haunches, and then urged him forward across the track." Referring to the main fact of contributory negligence, the court says:- " He made no effort to ascertain whether there was danger, before passing onto the crossing; but directed his attention, as he says, to getting his horse up the

Plaintiff in error contends that error was committed because some of the instructions which were requested on its behalf were refused. Refused instruction No. 1, which is pointed out, is as follows: "It is not the exercise of ordinary care and diligence for a person to drive with a horse directly on to a railroad crossing, known to be at the time to be dangerous, without making an effort by stopping, or listening, or otherwise, to ascertain whether a car is approaching, or whether it is safe to drive on the track with a horse."

Plaintiff in error insists that because this instruction was held proper in the case of C. & N.R.Ry. Co. v. Hatch, 79 Ill. 127, it was proper in this case and should have been given. It is, however, contended that the particular facts constituting contributory negligence upon which the instruction was based in the Hatch case were different, and moreover, were undisputed. The alleged negligence in the Hatch case, as stated by the Supreme Court, consisted of the running of a train composed of three or four cars and an engine, backyards against a one-horse wagon laden with flour and cement, belonging to appellee, as it was crossing appellee's track in one of the streets of the city of Chicago. The testimony in charge of appellee's wagon knew that the crossing was dangerous and had been familiar with it for over five years. There is also evidence that the driver on the wagon was approaching the train, and while not at danger, stopped his horse very suddenly, throwing his back on his harness, and then urged him forward across the track. The court says: "No issue as to negligence was raised, before passing into the street; but whether there was danger, as he says, to justify his action in the street, is a question of fact."

grade." It is apparent that in the Hatch case no effort was made by the plaintiff to ascertain whether there was danger from an approaching train or cars, before passing onto the crossing, and this was practically admitted, and could therefore properly be assumed in an instruction. But in this case whether or not the defendant in error made a proper effort to ascertain the danger, was a matter in dispute, and about which there was a conflict in the evidence.

It is error for a court, in an instruction, to assume as true a fact which is in dispute. ( I.C.R.R.Co. v. Zang, 19 Ill. App. 594; Merrill v. Corbin, 15 Ill. App. 81; City of Chicago v Edson, 43 Ill. App. 417; City of Chicago v Ripley, 84 Ill. 82; C.St.L.& B.R.R.Co. v Hutchinson, 120 Ill. 587; Mobile & O.R.R. Co., v Healy, 100 Ill. App. 586.) The instruction, therefore, was properly refused.

Appellant's refused instruction No. 2, is as follows:-

" If the evidence in this case shows that Mary Adams took the risk of crossing in front of the car before it could strike her, and in this was mistaken, that she miscalculated, and from any cause of her own was not able to pass safely in front, the plaintiff must bear the loss and the jury must find for the defendant."

This instruction was properly refused because there was no evidence in the case from which a reasonable inference might be drawn that the appellee crossed in front of a car, or took the risk of crossing in front of any car, or that she was struck because she attempted to cross in front of a car, and had miscalculated her ability to pass in safety, before it would strike her. Instructions which are not based upon evidence or upon what may be a reasonable inference from the evidence, are properly refused.





Plaintiff in error's refused instruction No. 5 is as follows:

" The court instructs the jury that if you believe from the evidence in the case that the plaintiff had sufficient opportunity to hear the sounding of the whistle of the car in question, and that such whistle was sounded when the plaintiff was several rods north of the railroad track, then you should consider this case the same as though the plaintiff did hear the whistle and then and in spite of such warning rode along in the carriage until the carriage was struck by the car, and then plaintiff then was guilty of such contributory negligence as would prevent her from recovering in this case. And the jury are instructed that this is true even though you may believe from the evidence that the motorman while the car was approaching the crossing in question did not maintain a proper outlook, or that the car was approaching said crossing at a high rate of speed. The law is that if the plaintiff was guilty of any negligent act which caused or contributed to cause the collision, damage, or injury in question, then no matter whether the defendant or its employees were negligent or not, the plaintiff cannot recover."

It may be said concerning this instruction that we are not prepared to hold that a person about to drive across a railroad track, especially at a city crossing, who has opportunity to hear a whistle sounded as a warning of an approaching train, but does not in fact hear it, shall be charged with the same responsibility concerning it as if he had heard it. We are of opinion that the instruction was properly refused.

We cannot agree with plaintiff in error in its contention that error was committed because the 4th, 5th and 6th instructions given for defendant in error contain certain repetitions of state-

Plaintiff in error's request in instruction No. 3 is as follows:  
 "The court instructs the jury that if you believe from the evidence  
 in the case that the Plaintiff had sufficient opportunity to hear  
 the sounding of the whistle of the car in question, and that such  
 whistle as sounded when the Plaintiff was several rods north of  
 the railroad track, then you should consider this as the same  
 as though the Plaintiff did hear the whistle and then and in spite  
 of such warning rode along in the carriage until the carriage was  
 struck by the car, and then Plaintiff then was guilty of such  
 contributory negligence as would prevent her from recovering in  
 this case. And the jury are instructed that this is true even  
 though you may believe from the evidence that the motorman while  
 the car was approaching the crossing in question did not maintain  
 a proper outlook, or that the car was approaching said crossing  
 at a high rate of speed. The law is that the Plaintiff was  
 guilty of any negligent act which caused or contributed to cause  
 the collision, damage, or injury in question, then no matter whether  
 the defendant or its employees were negligent or not, the Plaintiff  
 cannot recover."

It may be said concerning this instruction that we are  
 not prepared to hold that a person about to drive across a railroad  
 track, especially at a city crossing, who has opportunity to hear  
 a whistle sound as a warning of an approaching train, but does  
 not in fact do so, should be charged with contributory negligence  
 concerning it as if he had heard it. We are of opinion that the  
 instruction was properly released.

We cannot read this instruction as error in the construction  
 that error is a corrected because the 1st, 2nd and 3rd instructions  
 given the defendant in error contain certain corrections of error.



ments concerning the law and the respective rights and duties of a railroad company and a person crossing its tracks at a street crossing. These repetitions are not challenged as being erroneous, and it does not appear that repetitions of the law could have created in the minds of the jury an erroneous impression of the law, nor that the repetitions could have prejudiced the rights of plaintiff in error in any way.

It is also contended that the 5th instruction given for the defendant in error assumed that there was brush on the right of way of plaintiff in error, and that there is no evidence whatever that there was any brush on the right of way. In reference to this criticism of the instruction it is sufficient to say that there is evidence in the record that there was brush on the right of way, or what would reasonably come within the meaning of that term.

The instructions given state the law governing the case with substantial correctness upon all the points involved, and no error is apparent either in the giving or the refusal of the instructions. What we have said concerning the finding of the jury upon the main issues in the case applies with equal force to the contention of the plaintiff in error that the damages fixed in the verdict are excessive. If the defendant in error's statement as to the extent of her injuries, the pain and suffering connected therewith, and her inability to do the work she formerly did in consequence thereof, was truthful, the damages assessed by the jury are not excessive. It is evident that the jury came to the conclusion that the injuries of the defendant in error were real, and not feigned, and we cannot say that they were not justified in reaching this conclusion.

The judgment is affirmed.

ments concerning the law and the respective rights and duties of a railroad company and a person crossing at a street crossing. These regulations are not changed as being erroneous, and it does not appear that repetition of the law would have effected in the minds of the jury an erroneous impression of the law, nor that the regulations could have prejudiced the rights of plaintiff in error in any way.

It is also contended that the 5th instruction given to the defendant in error assumes that there was a brush on the right of way of plaintiff in error, and that there is no evidence whatever that there was any brush on the right of way. In reference to this criticism of the instruction it is sufficient to say that there is evidence in the record that there was a brush on the right of way, or what would reasonably come within the meaning of that term.

The instructions given state the law governing the case with substantial correctness upon all the points involved, and no error is apparent either in the giving or the refusal of the instruction. What we have said concerning the findings of the jury upon the issues in the case applies with equal force to the instructions. The plaintiff in error has the burden of proof in the case, and it is the duty of the jury to find in favor of the defendant in error if the evidence is so overwhelming as to leave no room for a reasonable doubt of her liability, the jury and the finding connected therewith, and the inability to do so was the former's duty in consequence of which, was true, the finding was not erroneous. It is evident that the jury came to the conclusion that the defendant in error was liable, and not liable, and we cannot say that they were not justified in reaching that conclusion. The finding is affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and \_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court.*



6266

2551

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:  
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 3

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Anna Weiderhold, Edith Gerber, )  
 Christina Schumacher, Emma Kurfiss, )  
 Alfred Kurfiss, Charles Kurfiss, )  
 Matilda Speer, Harold Kurfiss, )  
 Eva Kurfiss and Zelma Kurfiss, )  
 (Complainants) )

Appellees, )

vs. )

: Appeal from the City Court  
 of Sterling.

George Mathis, )

Appellant, )

(William Meyer, Lena Meyer, )  
 Carrie Lehman, Daniel Lehman, )  
 William Vetter, Lena Vetter, )  
 Louisa Eshelman, Aaron Eshelman, )  
 Michael Vetter and Fredericka )  
 Kurfiss, Defendants.) )

Niehaus, P. J.

This is a bill in equity for an accounting filed by

the appellees, Anna Weiderhold and others, who are heirs of the body of John Kurfiss, deceased, in the City Court of the City of Sterling, against the appellant, George Mathis, as Trustee, and the heirs at law of Gottlieb Vetter, deceased. The bill alleges that John Kurfiss was one of the heirs of Carl F. Kurfiss, deceased, and that by the terms of the last will of Carl F. Kurfiss, the share of John Kurfiss was devised to George Mathis, the appellant, as Trustee, to be held and invested by said Trustee for the benefit of said John Kurfiss; the interest accruing from said trust fund to be paid to him annually; and that by the terms of said last will the trust fund so created was to be divided at the death of John Kurfiss equally among the heirs of his body, who are the complainants. The bill further alleges that said will also provided that if a home could safely be secured by using the trust fund held by the appellant he

appeal from the City Court  
of Sterling.

Anna Weidner, Edith Gerber,  
Christina Kuehn, John Kuehn,  
Alfred Kuehn, George Kuehn,  
Matilda Kuehn, David Kuehn,  
Eva Kuehn and John Kuehn,  
(Complainants)  
Appellees.

George Kuehn,  
Appellant,  
(William Kuehn, John Kuehn,  
George Kuehn, Daniel Kuehn,  
William Kuehn, John Kuehn,  
Louis Kuehn, Aaron Kuehn,  
Michael Kuehn and Frederick  
Kuehn, Defendants.)

St. Louis, P. M.

This is a bill in equity for an accounting filed by

the appellants, Anna Weidner and others, who are heirs of the body  
of John Kuehn, deceased, in the City Court of the City of St. Louis,  
against the appellant, George Kuehn, as Trustee, and the heirs at law  
of Gottlieb Kuehn, deceased. The bill alleges that John Kuehn,  
was one of the heirs of Carl F. Kuehn, deceased, and that by the  
terms of the last will of Carl F. Kuehn, the share of John Kuehn  
was devised to George Kuehn, the appellant, as Trustee, to be held  
and invested by said trustee for the benefit of said John Kuehn;  
the interest accruing from said trust fund to be paid to him annually;  
and that by the terms of said will it was also provided that  
created was to be divided at the death of John Kuehn equally  
among the heirs of his body, who are the appellants. The bill  
further alleges that said will also provided that it was made  
safely be secured by making the trust fund out of the proceeds of the



might invest the same in such home for said John Kurfiss, if such home could be procured by means of such trust fund, so as to be entirely without incumbrance; and in that case such home should be deeded to said John Kurfiss, and the trust ended.

The appellees also charge in the bill that appellant never made any report of accounting as Trustee nor purchased such home for John Kurfiss so as to be free from incumbrance; but alleges that on August 13th 1907, the appellant entered into a contract with one Gottlieb Vetter, since deceased, for the purchase of a home for said John Kurfiss, and that on said contract there is a balance due of about \$600. That appellant made John Kurfiss several payments, the amount of which is unknown to appellees; and it is alleged that although appellant knew how much was due from himself as Trustee to the heirs of the body of John Kurfiss, deceased, and how much he had paid to said Vetter on the contract for the purchase of a home, he neglected and refused to inform them concerning these matters.

The answer filed by appellant denies that he never had any accounting with John Kurfiss, deceased, and avers that he did have such accounting, and that since the death of John Kurfiss he has offered to make account to the heirs of John Kurfiss, and also denies that he ever refused to give the appellees information in regard to his trusteeship; but avers, that he is and at all times has been ready and willing to pay to the heirs of Gottlieb Vetter the balance due them on said contract; and to pay such money as may remain payable to the heirs of John Kurfiss upon an accounting.

The case was referred to the Master, who made a report of the evidence and his findings, and upon this report the court entered a decree, finding that George Mathis, the appellant, received as Trustee for John Kurfiss, the sum of \$2242.52, which with interest to June 1st 1915, at 5% made a total of \$3162.42; that Mathis never

might have the same in such case for said John Kniffis, it was  
home could be preserved by means of such trust fund, so as to be en-  
tirely without encumbrance; and in that case such home would be  
deeded to said John Kniffis, and the trust ended.

The appellees charge in the bill that appellant never  
made any report of accounting as Trustee nor purchased such home for  
John Kniffis so as to be free from incumbrance; but alleges that on  
August 12th 1907, the appellant entered into a contract with one  
Gottlieb Vetter, since deceased, for the purchase of a home for said  
John Kniffis, and that on said contract there is a balance due of  
about \$800. That appellant made John Kniffis several payments, the  
amount of which is unknown to appellees; and it is alleged that  
although appellant knew how much was due from himself as Trustee to  
the heirs of the body of John Kniffis, deceased, and how much he had  
paid to said Vetter on the contract for the purchase of a home, he  
neglected and refused to inform them concerning these matters.

The answer filed by appellant denies that he never has any  
accounting with John Kniffis, deceased, and avers that he has  
such accounting, and that since the death of John Kniffis he has  
offered to make account to the heirs of John Kniffis, and also denies  
that he ever refused to give the appellees information in regard  
to his trusteeship; but avers, that he is now at all times ready  
and willing to pay to the heirs of Gottlieb Vetter the balance  
due them on said contract; and to pay such money as may remain  
payable to the heirs of John Kniffis upon an accounting.

The case was referred to the Master, who made a report of  
the evidence and his findings, and upon this report the court entered  
a decree, finding that George Kniffis, the appellant, was not a  
Trustee for John Kniffis, who died in 1884, and that the balance  
to June 1st 1915, of \$5,000.00 a total of \$5,000.00; and that the money



made any report as Trustee, and never had made any accounting, and that he had failed and neglected to account to the heirs of John Kurfiss; that appellant, as Trustee for John Kurfiss, entered into a contract for the purpose of a home for said John Kurfiss, at Sterling, Illinois, with Gottlieb Vetter, since deceased, and that there was due on said contract on June 1st 1915, a balance of \$556.15 to the heirs of Gottlieb Vetter, deceased; and that there was due from said appellant, as Trustee, a balance of \$975. which sum, however, included the balance stated to be due to the heirs of Gottlieb Vetter; and the court ordered payment of said amount of \$975 into court, with interest thereon at 5% per annum until paid; the decree also allows the appellant \$50 as compensation for his services as Trustee, and orders the costs of the suit to be charged against the trust fund.

An appeal was prayed from the decree, by the appellant, and the case is brought to this court for review upon two assignments of error, namely: That the court refused to allow \$150 instead of \$50 as compensation for the services of the appellant as Trustee, and that the court erred in refusing to allow appellant as credits upon his account as Trustee certain notes given by John Kurfiss to appellant amounting to the sum of \$419.70, and interest thereon from February 1st 1907. In addition to these errors the appellees have assigned the following cross errors, namely: That the court erred in allowing appellant \$100 for the money paid to Louisa Heffler, and erred in ordering the costs of the case to be borne by the appellees and charged against the trust fund, and erred in allowing appellant \$50 compensation for his services as Trustee.

made any report or trustee, and never had made any accounting, and that he had failed and neglected to account to the heirs of John Kuttiss; that appellant, as trustee for John Kuttiss, entered into a contract for the purchase of a home for said John Kuttiss, at Sterling, Illinois, with Gottlieb Vetter, since deceased, and that there was due on said contract on June 1st 1917, a balance of \$566.18 to the heirs of Gottlieb Vetter, deceased; and that there was due from said appellant, as trustee, a balance of \$75. which sum, however, included the balance stated to be due to the heirs of Gottlieb Vetter; and the court ordered payment of said amount of \$75 into court, with interest thereon at 5% per annum until paid; the decree also allows the appellant \$50 as compensation for his service as trustee, and orders the costs of the suit to be charged against the trust fund.

On appeal was prayed from the decree, by the appellant, and the case is brought to this court for review upon two assignments of error, namely: That the court refused to allow \$100 instead of \$50 as compensation for the services of the appellant as trustee, and that the court erred in refusing to allow appellant as trustee upon his account as trustee certain notes given by John Kuttiss to appellant amounting to the sum of \$229.70, and interest thereon from January 1st 1907. In addition to these errors the appellant have assigned the following errors, namely: That the court erred in allowing appellant \$100 for the money paid to John Kuttiss, and erred in ordering the costs of the suit to be borne by the appellant, and against the trust fund, and erred in allowing appellant \$50 compensation for his services as trustee.

The evidence shows that the appellant acted as Trustee by virtue of a clause in the codicil to the will of Carl F. Kurfiss, deceased, which designated him to take charge of the share which John Kurfiss was to receive from the estate of the testator; which clause is as follows: " Said share of my estate which should go to my son, John Kurfiss, I hereby devise and bequeath to my friend George Mathis, to have and to hold in trust for my son John Kurfiss, to be held and invested for his benefit, and the interest of said share of money shall be paid to him annually during his life, said share of money to be paid share and share alike to the heirs of his body, when dead. It is, however, my will, that whenever a home can be safely secured by using this money, said Trustee shall so invest the fund held in trust by him ; provided said home can be secured so as to be entirely without incumbrance, in which case said home shall be deeded to my son John Kurfiss, and thus end the trust."

According to the reports of the executors of the estate of Carl F. Kurfiss, it appears that the appellant, as Trustee, received for John Kurfiss the following sums: February 1, 1906, \$516.66; May 1, 1906, \$1233.33; November 4, 1912, \$592.53, making a total of \$2342.52. The Master in his report deducted \$100 from the amount received, which had been paid to Louisa Heffler, one of the devisees of the testator, by direction of the will. The appellant was one of the executors of the will of Carl F. Kurfiss as well as Trustee for John Kurfiss. The will provides that "the sum of \$190.00 shall be deducted from the share of my son, John Kurfiss, and shall be paid to my daughter Louisa Hoefler." The \$100.00 item had been paid to Louisa Hoefler under this provision of the will, and should have been



The evidence shows that the appellant acted as trustee by  
 virtue of a clause in the codicil to the will of Carl F. Kurfies,  
 deceased, which designated him to take charge of the share which John  
 Kurfies was to receive from the estate of the testator; which clause  
 is as follows: "Said share of my estate which should go to my son,  
 John Kurfies, I hereby devise and bequeath to my friend George H. Hoefler,  
 to have and to hold in trust for my son John Kurfies, to be paid and  
 invested for his benefit, and the interest of said share of money  
 shall be paid to him annually during his life, said share of money  
 to be paid share and share alike to the heirs of his body, when dead.  
 It is, however, my will, that whenever a home can be legally secured  
 by using this money, said Trustee shall so invest the fund held in  
 trust by him; provided said home can be secured so as to be entirely  
 without incumbrance, in which case said home shall be devised to my  
 son John Kurfies, and thus end the trust."  
 According to the reports of the executors of the estate of  
 Carl F. Kurfies, it appears that the appellant, as Trustee, received  
 for John Kurfies the following sums: February 1, 1906, \$510.66;  
 May 1, 1906, \$2342.52; November 4, 1912, \$282.52, making a total of  
 \$3442.52. The Trustee in his report deducted \$100 from the amount  
 received, which had been paid to Louis Hoefler, one of the devisees  
 of the testator, by direction of the will. The appellant was one of  
 the executors of the will of Carl F. Kurfies as well as Trustee for  
 John Kurfies. The will provides that the sum of \$100.00 shall be  
 deducted from the share of my son, John Kurfies, and shall be paid to  
 my daughter Louis Hoefler. The \$100.00 that had been paid to  
 Louis Hoefler under this provision of the will, and should have been

deducted from the \$516.66 which the report of the executors shows was paid to appellant as Trustee, on February 1st 1906; the appellant really received \$416.66 as Trustee, and not \$516.66. The Master made the correction, and we think it was properly made.

The duties which devolved on the appellant, as Trustee, by the terms of the will were to invest the trust fund for the benefit of John Kurfiss, ~~which was to~~ so that it would produce interest and to pay the interest which was thereby produced, annually, to John Kurfiss, and there is a direction in the will that if a home could be safely secured for John Kurfiss by using the trust fund for that purpose that then the Trustee was to invest the fund in such home; if such home could be secured with the trust fund so as to be entirely without incumbrance, and the home was to be deeded to John Kurfiss, and the trust then ended.

The evidence shows that the trust fund was invested by appellant by making various loans and the loans so made produced a reasonable interest. It is not material at this time except on the question of compensation of the trustee, to consider the question whether the loans so made were properly safe-guarded by security, inasmuch as there is nothing in the record to indicate that any part of the funds loaned out was lost or diminished thereby.

In order to simplify the proof as to the amount of this accrued interest and for greater certainty in the matter of accounting, it was stipulated by the parties that the appellant should be chargeable with interest on the trust funds that came to his hands at the rate of 5% per annum from the date of their receipt, and that he should be allowed interest at the rate of 5% per annum on all moneys paid out by him, by check, money order or otherwise on account of his trusteeship, said interest to be computed from the respective dates of said payments made by him. The court found the amount of this interest

deducted from the \$10.00 which the executor shows was paid to appellant as trustee, on February 1st 1908; the appellant really received \$10.00 as trustee, and not \$10.00. The trustee made the correction, and we think it was properly made.

The duties which involved on the appellant, as trustee, by the terms of the will were to invest the trust fund for the benefit of John Knutson, and to produce interest at and to pay the interest which was thereby produced, annually, to John Knutson, and there is a direction in the will that it is a home could be safely secured for John Knutson by using the trust fund for that purpose; then the trustee was to invest the fund in such home; if such home could be secured with the trust fund so as to be entirely without insurance, and the home was to be deeded to John Knutson, and the trust then ended.

The evidence shows that the trust fund was invested by appellant by making various loans and the loans so made produced a reasonable interest. It is not material at this time except on the question of compensation of the trustee, to consider the question whether the loans so made were properly and lawfully secured, inasmuch as there is nothing in the record to indicate that any part of the funds loaned out was lost or diminished thereby.

In order to simplify the record as to the amount of principal interest and for greater certainty in the matter of accounting, it was stipulated by the parties that the appellant should be charged with interest on the trust funds from date to date of the date of payment made by him. The court found the amount of this interest



to June 1st, 1915, to be \$919.90.

The appellant also sought to carry into effect the provision in the will concerning the procuring of a home for John Kurfiss, and it is apparent from the evidence that what he did in reference to this feature of the trust was done in good faith, and believing that he was properly carrying into effect the provisions of the will. He made a written contract on the 13th day of August, 1907, as Trustee, with Gottlieb Vetter, for the purchase of this home. The purchase price agreed upon was \$1500, \$300 of which was paid in cash at the time of making the contract, and it was agreed in the contract that \$275 was to be paid on October 15, 1907; the balance of the purchase price could be paid at any interest paying time, but was to become due and payable six months after the death of Gottlieb Vetter. It was stipulated in the contract that the contract should in effect become a warranty deed to said George Mathis upon the payment of the amount due thereon into any National Bank in Sterling, and the filing of a receipt showing payment, in the office of the Recorder of Deeds, in case the heirs of Gottlieb Vetter refused to execute a deed; and there is also a provision in the contract that as much money as might be needed for the maintenance of said Gottlieb Vetter, at any time, should be paid with reasonable promptness, and that the property was to be deeded to John Kurfiss or his heirs. The home thus secured was turned over to John Kurfiss and he and his family took possession of it and occupied it and enjoyed the use of it up to the time of the death of John Kurfiss; whereupon it passed into the possession and use of the appellees, as heirs.

to June 1st, 1913, to be \$12.90.

The appellant also sought to carry into effect the provision in the will concerning the procuring of a home for John L. Vetter, and it is apparent from the evidence that what he did in reference to this feature of the trust was done in good faith, and believing that he was properly carrying into effect the provision of the will. He made a written contract on the 13th day of August, 1907, as Trustee, with Gottlieb Vetter, for the purchase of this horse. The purchase price agreed upon was \$1500, \$500 of which was paid in cash at the time of making the contract, and it was agreed in the contract that \$250 was to be paid on October 15, 1907; the balance of the purchase price could be paid at any interest paying time, but was to become due and payable six months after the death of Gottlieb Vetter. It was stipulated in the contract that the contract should in effect become a warranty deed to said George Lathin upon the payment of the amount due thereon into any National Bank in Sterling, and the filing of a receipt for the payment, in the office of the Recorder of Deeds, in case the heirs of Gottlieb Vetter refused to execute a deed; and there is also a provision in the contract that as much money as might be needed for the maintenance of said Gottlieb Vetter, at any time, should be paid with reason due prudence, and that the property was to be added to John L. Vetter or his heirs. The horse was turned over to John L. Vetter and he and his family took possession of it and accented it and enjoyed the use of it up to the time of the death of John L. Vetter; whereupon it passed into the possession and use of the appellee, as heirs.



The appellant paid the sum of \$1052.25 from the trust fund on the home purchased, under the terms of the contract made with Gottlieb Vetter prior to the death of Vetter; he also turned over to John Kurfiss from the trust fund the amount of \$450 to repair, remodel and improve this home, so as to make it more comfortable, and to better adapt it for use and enjoyment as a home. It is true that appellant did not carry into effect the provision of the will of Carl F. Kurfiss in regard to the purchase of such home exactly as contemplated by the testator. The idea of the testator no doubt was that the home to be purchased shall be one that would come within the purchasing power of the fund, and paid for at once, so as not to leave an unpaid balance which might encumber it. Nevertheless, there is not a direct inhibition in the will against the purchase of such home by the Trustee on partial payments. The amount stipulated to be paid for this home together with the amounts paid out for repairing and improving it, clearly came within the purchasing power of the trust fund, and the payment of all the money would have left the home without encumbrance, as the testator contemplated it should be. So that while the manner of procuring the home for John Kurfiss was somewhat irregular, it was intended to be and would have resulted finally in practically complying with the directions given in the will. John Kurfiss in his lifetime and the appellees as heirs of his body, had the same use and enjoyment of this home as if the same had been purchased and paid for, in the exact manner contemplated by the testator as expressed in his will.

We are of opinion that the money expended for the home and for its repair, improvement and remodeling by the Trustee were proper charges against the corpus of the trust estate, and were properly deducted therefrom.

It is insisted by appellees that the appellant should have

The question is: Is the sum of \$1082.25 from the trust fund on the home purchase, under the terms of the contract made with Gottlieb Vetter prior to the death of Vetter; he has turned over to John Karlsson from the first fund the amount of \$450 to repair, remodel and improve this home, so as to make it more comfortable, and to better adapt it for use and enjoyment as a home. It is true that appellant did not carry into effect the provision of the will of Carl B. Karlsson in regard to the purchase of such home exactly as contemplated by the testator. The idea of the testator no doubt was that the home to be purchased shall be one that would come within the purchasing power of the fund, and paid for at once, so as not to leave an unpaid balance which might encumber it. Nevertheless, there is not a direct inhibition in the will against the purchase of such home by the trustee on partial payments. The account stipulated to be paid for this home together with the accounts paid out for repairing and improving it, clearly came within the purchasing power of the trust fund, and the payment of all the money would have left the home without encumbrance, as the trust for contemplated it should be. So that while the manner of procuring the home for John Karlsson was somewhat irregular, it is intended to be that only have resulted finally in practically complying with the directions given in the will. John Karlsson in his lifetime and the repairs he held of his body, and the same man and wife owned this home as if the same had been purchased and paid for, in the same manner contemplated by the testator as expressed in his will.

In view of relation that the money expended for the home and for its repair, improvement and remodeling by the trustee was proper charges against the corpus of the trust estate, and the principal deducted therefrom.

It is insisted by appellee that the plaintiff cannot have

made an accounting as Trustee, to them, as heirs of the body of John Kurfiss, immediately after the death of John Kurfiss, but it appears that three of these heirs were minors, and under these circumstances no personal settlement of the matters in controversy could have been made which would have been binding upon all. If the adult heirs had decided to enforce a settlement or accounting they should have had a guardian appointed for the minors; and appellant cannot legally be regarded in default because a settlement and accounting with the persons interested was not made.

We are of opinion that the amount of the notes and interest thereon which were held by the appellant against John Kurfiss and which he had given to appellant for the groceries and provisions and family necessities with which the Trustee had provided him, are a proper charge against the accumulated interest which accrued on the fund, up to the time of the death of John Kurfiss. These groceries, provisions and family necessities were really furnished to John Kurfiss, in lieu of payments of interest, and because <sup>they</sup> ~~there~~ were furnished no doubt accounts for the fact that John Kurfiss did not demand nor receive the interest which was accumulating on the trust fund. Equitably, therefore, the Trustee should have the right to apply this interest in liquidation of the debt which was really incurred with reference to its payment out of this interest.

But there is another reason why equity would require the application of this interest to the payment of the notes in question. The interest which had accumulated in the hands of the Trustee at the time of the death of John Kurfiss, the Trustee was holding for John Kurfiss; it was the property of John Kurfiss and at the time of his death it passed to the appellees as his heirs at law, and not as heirs



made an account of the estate, to them, as heirs of the body of John Kurland, immediately after the death of John Kurland, but it appears that three of the heirs were minors, and under those circumstances no personal settlement of the estate in controversy could have been made which could have been binding upon all. If the heirs had decided to enforce a settlement or accounting they should have had a guardian appointed for the minors; and applicant cannot legally be regarded in default because a settlement and accounting with the persons interested was not made.

We are of opinion that the amount of the notes and interest thereon which were held by the applicant against John Kurland and which he has given to applicant for the proceeds and provisions and family necessities with which the Trustee had provided him, was a proper charge against the consolidated interest which existed on the date, up to the time of the death of John Kurland. These proceeds, provisions and family necessities were really included to John Kurland, in lieu of payments of interest, and because there were furnished no doubt accounts for the fact that John Kurland did not demand nor receive the interest which was accounted on the first trial.

Equitably, therefore, the Trustee should have the right to apply this interest in liquidation of the debt which was legally incurred with reference to its payment out of this interest.

But there is another reason why equity would require the application of this interest to the payment of the notes in question. The interest which had been included in the estate of the Trustee at the time of the death of John Kurland, the Trustee was holding for John Kurland; it was the property of John Kurland and at the time of his death it passed to the applicant as his heir at law, and not as heirs

of his body under the terms of the will of Carl F. Kurfiss but the appellees are entitled to it as heirs at law, subject to the payment of the debts of John Kurfiss. The right, therefore, to apply it in liquidation of this debt of John Kurfiss is superior to the right of the heirs at law to receive it and it should therefore be so applied.

The question of compensation for the services of the Trustee which is raised by the appellants' assignment of errors and the cross-errors assigned by the appellees is a matter addressed to the sound discretion of the trial court.

It is apparent in this case that to have properly carried out the trust the appellant should have filed a bill in equity in the circuit court, bringing into court all the parties in interest during the lifetime of John Kurfiss, and then have made an accounting to the court. In this way all the matters would have been settled for which this suit was instituted, and he could then also have made an annual accounting to the court, and would have been in position to have made a final accounting promptly upon the death of John Kurfiss, and without any delay. His manner of carrying out the trust was also somewhat irregular and negligent, not only in the accounting but in keeping his accounts and in carrying into effect the directions given in the will; and while the trust estate suffered no loss or diminution on that account and his conduct of the affairs of the trust estate was clearly in good faith, yet his negligence and irregularities as Trustee were proper to be considered by the court in fixing the amount of compensation; and undoubtedly the court in fixing \$50 instead of \$150 claimed by the appellant took all these matters into consideration. We would not, therefore, be warranted in saying in this case that such discretion of the court has been abused in fixing the compensation of



of his body under the terms of the will of Carl J. Kurilas but the  
appellee is entitled to it as heirs at law, subject to the payment  
of the debts of John Kurilas. The right, therefore, to apply it in  
liquidation of this debt of John Kurilas is superior to the right of  
the heirs at law to receive it and it should therefore be so applied.  
The question of compensation for the services of the trustee  
which is raised by the appellee's assignment of error and the cross-  
errors assigned by the appellee is a matter addressed to the sound  
discretion of the trial court.  
It is apparent in this case that to have properly carried  
out the trust the appellant should have filed a bill in equity in the  
 Circuit court, bringing into court all the parties interested during  
the lifetime of John Kurilas, and then have made an accounting to the  
court. In this way all the matters would have been settled for which  
this suit was instituted, and no could then also have made an annual  
accounting to the court, and would have been in position to have made  
a final accounting promptly upon the death of John Kurilas, and with-  
out any delay. His manner of carrying out the trust was also somewhat  
irregular and negligent, not only in the accounting but in keeping  
his accounts and in carrying into effect the directions given in the  
will; and while the trust estate suffered no loss or diminution on  
that account and his conduct of the affairs of the trust estate was  
clearly in good faith, yet his negligence and irregularities as  
Trustee were proper to be considered by the court in fixing the amount  
of compensation; and undoubtedly the court in fixing \$50 instead of  
\$150 claimed by the appellant took all these matters into consideration.  
We would not, therefore, be warranted in saying in this case that such  
discretion of the court has been abused in fixing the compensation of

the Trustee. Under the rule cited in Kingsbury vs Powers, 131 Ill. 182, we are of opinion that the costs were properly charged against the trust estate, and the costs on this appeal should be divided, appellant paying one half and appellee the other half.

For the reasons stated the decree should be reversed in part, and the cause remanded with directions that in stating the account between the parties the interest which was accumulated on the trust fund at the time of the death of John Kurfiss should be applied in liquidation of the notes and interest of John Kurfiss, held by the appellant. In other respects the decree is affirmed.

Decree affirmed in part and reversed in part.

the trustees. Under the rule cited in Kingsbury vs Powers, 131 Ill. 182, no rule of decision that the costs were properly charged against the trustees, and the costs on this appeal should be divided equally. I am not saying one half and appellee the other half.

of the reasons stated the decree should be reversed in part, and the same rephrased with directions that in setting the account between the parties the interest which was accumulated on the first part of the time of the death of John Williams should be applied in liquidation of the notes and interest of John Williams, held by the plaintiff. In other respects the decree is affirmed.

Decree affirmed in part and reversed in part.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*





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2552

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 6

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:

THE UNIVERSITY OF CHICAGO  
DIVISION OF THE PHYSICAL SCIENCES  
DEPARTMENT OF CHEMISTRY

RECEIVED JAN 10 1964

FROM THE  
DEPARTMENT OF CHEMISTRY  
UNIVERSITY OF CHICAGO  
CHICAGO, ILLINOIS 60637

TO THE  
DIRECTOR  
NATIONAL BUREAU OF STANDARDS  
WASHINGTON, D.C. 20540

RE: [Illegible text]

DATE: [Illegible text]

BY: [Illegible text]

People of the State of Illinois.

appellee.

vs

Appeal from Rock Island.

Henry Klehm, appellant.

Niehaus, P. J.

This is an appeal from an order of the Circuit Court of Rock Island County adjudging the appellant Henry Klehm guilty of contempt of court, and adjudging a fine of \$25. against him, and costs of suit. It involves the question of the authority of the circuit court to make the disobedience of a subpoena issued by a notary public or commissioner empowered to take depositions of witnesses in a case pending in another county, the basis of contempt proceedings.

It appears from the evidence, that the appellant, who is a resident of Rock Island County, was subpoenaed by Elvira Sundberg, in her capacity of notary public and commissioner, to appear before her on the 17th. day of December 1915, and to produce at that time and place, all letters, checks, receipts telegrams and documentary evidence concerning his business with other defendants, to be used in evidence in a suit wherein the Mechanics and Merchants Savings Bank of Moline, Illinois, a corporation, was plaintiff, and John Klehm, George Klehm, Charles Klehm and Henry Klehm, as co-partners, were defendants, pending in the Superior Court of Cook County.

The subpoena was duly served on the appellant in person on the 24th. day of November 1915; but he refused to obey the subpoena. The notary public, Elvira Sundberg, thereupon filed a petition in the Circuit Court of Rock Island County, alleging that on the 4th. day of October 1915, a *dedimus potestatem* under the seal of the Superior Court of Cook County, in the

People of the State of Illinois.

Appellee.

Appeal from Rock Island.

vs

Henry Kiehm, appellant.

Michans, P. J.

This is an appeal from an order of the Circuit Court of Rock Island County adjudging the appellant Henry Kiehm guilty of contempt of court, and adjudging a fine of \$25. against him, and costs of suit. It involves the question of the authority of the circuit court to make the disobedience of a subpoena issued by a notary public or commissioner empowered to take depositions of witnesses in a case pending in another county, the basis of contempt proceedings.

It appears from the evidence, that the appellant, who is a resident of Rock Island County, was subpoenaed by Vivian Sunberg, in her capacity of notary public and commissioner, to appear before her on the 15th day of December 1915, and to produce at that time and place, all letters, checks, receipts, telegrams and documentary evidence concerning his business with other defendants, to be used in evidence in suit wherein the Mechanics and Merchants Savings Bank of Moline, Illinois, a corporation, was plaintiff, and John Kiehm, George Kiehm, Charles Kiehm and Henry Kiehm, a co-defendant, were defendants, pending in the Superior Court of Cook County.

The subpoena was duly served on the appellant in person on the 14th day of November 1915; but he refused to obey the subpoena. The notary public, Vivian Sunberg, thereupon filed a petition in the Circuit Court of Rock Island County, alleging that on the 4th day of October 1915, a witness testified under the seal of the Superior Court of Cook County, in the



case mentioned , was duly issued to her as Commissioner, empowering her to examine certain witnesses named in the notice and affidavit filed in that case; that the appellant was one of the witnesses to be examined; that she issued a subpoena duces tecum under her seal as notary, requiring the appellant to appear before her on the 7th. day of December 1915, and to bring with him, the papers and documentary evidence mentioned; and that he neglected and refused to do so.

Upon the filing of this petition, the Circuit Court ordered the clerk to issue an attachment, directed to the sheriff of Rock Island county, commanding him to take the body of the appellant, and bring him forthwith before the court, to be dealt with for contempt, for failure to obey the subpoena. Subsequently, another order was entered, directing that appellant appear and show cause instantler, why the court should not enter an order commanding him to be and appear as a witness for the plaintiff, before the notary mentioned, in obedience to the notary's subpoena.

The appellant thereupon filed a special appearance in the Circuit Court of Rock Island County; and asked the court to quash the writ of attachment issued; and thereafter the court ordered that the appellant appear before the notary, at the hour of nine o'clock, at her office in the city of Moline, to testify, and to produce the books, statements, papers and documents mentioned in the subpoena; and that in case of his failure to so appear, that he was directed to appear before the Circuit Court of Rock Island county, at ten o'clock A. M. on the same day, and show cause why he failed to appear before the notary.

The notary thereupon filed in the circuit court of Rock Island county, a report, in which she states that the



case mentioned, was duly issued to her as Commissioner, ex-officio.

ing her to examine certain witnesses named in the notice and affidavit filed in that case; that the appellant was one of the witnesses to be examined; that she issued a subpoena in testum under her seal as notary, returning the appellant to appear before her on the 7th day of December 1812, and to bring with him, the papers and documentary evidence mentioned; and that he neglected and refused to do so.

Upon the filing of this petition, the Circuit Court ordered the clerk to issue an attachment, directed to the sheriff of Rock Island county, commanding him to take the body of the appellant, and bring him forthwith before the court, to be dealt with for contempt, for failure to obey the subpoena. Subsequently, another order was entered, directing that appellant appear and show cause instantly, why the court should not enter an order commanding him to be and appear as a witness for the plaintiff, before the notary mentioned, in obedience to the notary's subpoena.

The appellant thereupon filed a special appearance in the Circuit Court of Rock Island County; and asked the court to quash the writ of attachment issued; and after the court ordered that the appellant appear before the notary, at the hour of nine o'clock, at her office in the city of Moline, to testify, and to produce the books, statements, papers and documents mentioned in the subpoena; and that in case of his failure to so appear, that he was directed to appear before the Circuit Court of Rock Island county, at ten o'clock A. M. on the same day, and show cause why he failed to appear before the notary.

The notary thereupon filed in the Circuit Court of Rock Island county, a report, in which she stated that the

appellant failed, and neglected to appear before her at the hour of nine o'clock, December 16th. as required by the order theretofore entered by the Circuit Court; and the appellant thereupon moved to strike from the files the report of the notary, and be discharged from said rule, and filed an answer to the petition of the notary; but the circuit court denied hhe motion to strike the report and to discharge the appellant, and held his answer to the report to be insufficient; and thereupon adjudged that the appellant's neglect and failure to be and appear before the notary, at nine o'clock A. M. on the 16th day of December and to produce the documents, books, and papers mentioned, was wilful, and without lawful excuse; and fined the appellant \$25. and costs, for contemot of court.

The question presented by the record, as to the power and authority of the Circuit Court of Rock Island County, to punish summarily for contempt of court, under the circumstances detailed, is substantially the same as that raised in the case of Puterbaugh vs Smith. 131 Ill. 199; and it was there passed upon by the Supreme Court. It was held in that case, that the refusal of a witness to appear before a notary public and give his deposition, inobedience to a subpoena issued by the notary acting under the authority of a dedimus potestatem, in a case pending in another jurisdiction, could not be considered contempt of court of the tribunal administering the punishment.

In the case cited, the Circuit Court proceeded as provided by the statute, and in a summary way, as in the case at bar, to attach an offending witness for contempt of court, for failing to appear before a notary public, as directed by the Notary's subpoena. The proceedings in this case, first by petition, directing the attention of the court to the failure and neglect of the witness to appear before the ndary, and f

appellant failed, and selected to appear before him at the hour of nine o'clock, December fifth, as required by the order theretofore entered by the Circuit Court; and the appellant thereupon moved to strike from the files the report of the notary, and be discharged from said rule, and filed an answer to the petition of the notary; but the circuit court failed to motion to strike the report and to discharge the appellant, and held his answer to the report to be insufficient; and thereupon adjudged that the appellant's neglect and failure to be and appear before the notary, at nine o'clock A. M. on the fifth day of December and to produce the documents, books, and papers mentioned, was willful, and without lawful excuse; and fined the appellant \$25. and costs, for contempt of court.

The question presented by the record, as to the power and authority of the Circuit Court of Rock Island County, to punish summarily for contempt of court, under the circumstances detailed, is substantially the same as that raised in the case of *Putnam vs. Smith*, 131 Ill. 152; and it was there passed upon by the Supreme Court. It was held in that case, that the refusal of a witness to appear before a notary public and give his deposition, in obedience to a subpoena issued by the notary acting under the authority of a de iure potestas, in a case pending in another jurisdiction, could not be considered contempt of court of the tribunal administering the punishment.

In the case cited, the Circuit Court proceeded as provided by the statute, and in a summary way, as in the case at bar, to attach an offending witness for contempt of court, for failing to appear before a notary public, as directed by the Notary's subpoena. The proceeding in this case, by petition, inviting the attention of the court to the failure and neglect of the witness to appear before the notary, and



afterwards obtaining an order of the court commanding the witness to obey the subpoena, to appear before the notary, and then reporting the fact of his refusal to do so, while somewhat different in detail, yet in effect are substantially the same as those which were resorted to in the case cited.

In this case the proceedings were summary proceedings instituted for the same purpose, - namely, to punish the appellant for disobeying the mandate of the subpoena issued by a notary who was commissioner to take evidence in a case not pending in the court which administers the punishment for such contempt.. It is recognized as a well settled rule of law, that only the court whose order or authority is defied, has the power to punish for contempt, and that the court's authority cannot be considered as defied when the contempt arises from disobedience of a writ or mandate issued by another tribunal, in a case pending in another court. (Rapalje on Contempts, Sec. 13; Hawes on Jurisdiction of courts, Sec. 233.)

In this case, as in the case of Puterbaugh vs Smith supra, the summary proceedings were in one tribunal, for an act done in derogation of the authority of another tribunal; the ability of the tribunal administering the punishment, to exercise its ~~xxxx~~ proper functions, was therefore not involved and the act charged, could not have had any tendency to hinder or delay the latter tribunal in the lawful execution of its authority, which is confined to matters pending within its jurisdiction. The principles enunciated and conclusions reached in the case of Puterbaugh vs Smith were reaffirmed and again emphasized, by the Supreme Court, in McIntire vs The People, 227 Ill. 26, and are clearly decisive of the questions here involved.

We are of opinion therefore, that the appellant cannot be

afterwards obtaining an order of the court compelling the witness to obey the subpoena, to appear before the notary, and then reporting the fact of his refusal to do so, while some what different in detail, yet in effect are substantially the same as those which were resorted to in the case cited.

In this case the proceedings were summary proceedings instituted for the same purpose, - namely, to punish the appellant for disobeying the mandate of the subpoena issued by notary who was commissioner to take evidence in a case not pending in the court which administers the punishment for such contempt. It is recognized as a well settled rule of law, that only the court whose order or authority is defied, has the power to punish for contempt, and that the court's authority cannot be considered as defied when the contempt arises from disobedience of a writ or mandate issued by another tribunal, in a case pending in another court. (Inquiries on Contempts,

Sec. 13; Hays on Jurisdiction of courts, Sec. 205)

In this case, as in the case of Puterbaugh vs Smith supra, the summary proceedings were in one tribunal, for an act done in derogation of the authority of another tribunal; the ability of the tribunal administering the punishment, to exercise its proper functions, was therefore not involved and the act charged, could not have had any tendency to hinder or delay the latter tribunal in the lawful execution of its authority, which is confined to matters pending within its jurisdiction. The principles enunciated and conclusions reached in the case of Puterbaugh vs Smith were reaffirmed and again emphasized, by the Supreme Court, in McIntire vs The People, 237 Ill. 38, and are clearly isolative of the questions here involved.

We are of opinion therefore, that no appellant conduct



considered as guilty of contempt of the Circuit Court of Rock Island County, in disobeying the subpoena of the Notary Public and the Circuit Court of Rock Island County was without power to punish the appellant for such disobedience. The judgment of the court is therefore reversed.

Judgment reversed.

considered as guilty of contempt of the Circuit Court of Cook  
 Island County, in disobeying the subpoena of the County Clerk  
 and the Circuit Court of Cook Island County was without power  
 to punish the appellant for such disobedience. The judgment  
 of the court is therefore reversed.

Judgment reversed.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



6296

2554

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 17

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 6396

Sadie Coonan, appellee

vs

Appeal from Will.

James Straka et al appellants.

Niehau, P. J.

This is a suit brought by the appellee, Sadie Coonan, in the Circuit Court of Will County, against the appellants, James Straka and Josephine Straka, doing business as Joliet Steam Dye House, to recover damages from personal injuries which the appellee claims to have sustained, as the result of being struck and thrown upon the ground, by appellants' automobile, when she was crossing Arch Court, a public street in the city of Joliet.

The declaration filed contains two counts. The first count alleges, that the automobile of the appellants was operated and managed by a servant and agent of the appellants; and that it was run at a high and dangerous rate of speed, at the crossing; and that the appellants' servant failed to give the appellee any warning or signal of the approach of the automobile and failed to exercise reasonable care to avoid a collision; that he carelessly, negligently, wilfully and wantonly struck, collided with and ran over the appellee, who was rightfully at the intersection of the street in question, and in the exercise of reasonable care for her own safety.

The second count of the declaration sets out sections 1 and 7 of the ordinances of the city of Joliet, requiring any vehicle, except when passing another vehicle ahead, to keep as near the right curb of the street as possible; and when turning into another street to the left, requiring it to turn around the intersection of the two streets; and it further alleges, that the appellants, by their servant and agent in

This is a writ brought by the appellees, Saline County, in the Circuit Court of Will County, against the appellants, James Straka and Josephine Straka, doing business as Joliet Steam Dye House, to recover damages from personal injuries which the appellees claim to have sustained, as the result of being struck and thrown upon the ground, by a public street automobile, when she was crossing Arch Court, a public street in the city of Joliet.

The declaration filed contains two counts. The first count alleges, that the automobile of the appellees was operated and managed by a servant and agent of the appellees; and that it was run at a high and dangerous rate of speed, at the crossing; and that the appellees' servant failed to give the appellees any warning or signal at the approach of the automobile; and failed to exercise reasonable care to avoid a collision; that he carelessly, negligently, willfully and wantonly struck, collided with and ran over the appellees, who were rightfully at the intersection of the street in question, and in the exercise of reasonable care for her own safety.

The second count of the declaration sets out sections 1 and 7 of the ordinances of the city of Joliet, requiring any vehicle, except when passing another vehicle ahead, to keep as near the right curb of the street as possible; and when turning into another street to the left, requiring it to turn around the intersection of the two streets; and it further alleges, that the appellees, by their servant and agent in

charge of the automobile in question, carelessly and negligently drove and operated the automobile which struck the appellee, on the left hand side of the street on which it was then running, and that in turning the corner at the intersection of the street in question with Cass street, (the street which appellee was crossing) failed to operate and drive the automobile around the intersection of the two streets as required by the ordinance referred to; and that he carelessly, negligently, wilfully and wantonly then and there struck, collided with and ran over the appellee, who was rightfully upon said public street, and at the intersection; and in the exercise of reasonable care for her own safety.

To this declaration the appellants filed the general issue, upon which a trial was had before a jury. The jury found appellants guilty, and assessed appellee's damages at \$900. Appellants thereupon made a motion for a new trial, which was overruled; and the Court entered judgment on the verdict of the jury; from which judgment this appeal is prosecuted.

Appellants contend, that the judgment should be reversed because errors were committed in instructions which were given for appellee at the trial, and in the refusal of instructions requested for appellants; also that the verdict is manifestly against the weight of the evidence.

There was a conflict in the evidence concerning the manner in which appellee received her injuries, and as to how the collision happened. The appellee testified that she was walking along the south side of Cass street, going toward the east, and in crossing Arch Court, stopped about 12 feet from the sidewalk, on the crossing, to converse with a friend, for a minute; and then left her friend, and walked about 3 or 10 feet further, on the crossing, and was within 10 or 12 feet of the



charge of the automobile in question, a witness, and particularly drove and operated the automobile in which struck and killed, on the left hand side of the street on which it was then running, and that in turning the corner at the intersection of the street in question with Canal Street, (the street which sometimes was crowded) failed to operate and drive the automobile around the intersection of the two streets as required by the ordinance referred to; and that he carelessly, negligently, wilfully and intentionally and with these acts, collided with and ran over the appellee, who was rightfully upon and upon the street, and at the intersection; and in the exercise of reasonable care for her own safety.

To this resolution the appellant filed the general issue, upon which a trial was had before a jury. The jury found appellee guilty, and assessed appellee's damages at \$200. Appellant thereupon made a motion for a new trial, which was overruled; and the Court entered judgment on the verdict of the jury; from which judgment this appeal is prosecuted. A bill of exceptions, that the judgment should be reversed because errors were committed in instructions which were given for a bill at the trial, and in the refusal of instructions requested for appellee; and that the verdict is manifestly against the right of the appellee.

There was a conflict in the evidence concerning the manner in which appellee received her injuries, and as to how the collision happened. The appellee testified that she was walking along the south side of Canal Street, going toward the east, and in crossing the Court, stopped about 15 feet from the sidewalk, on the sidewalk, she conversed with a friend, for a minute; and then left her friend, and walked about 10 feet further, on the sidewalk, and was within 10 feet of the

south east corner of Arch ~~xxxxx~~ Court and Cass street, when she was struck by the automobile in question; that the automobile was coming along on the left hand side of Cass street, and turned directly to the left at the corner, instead of turning around the intersection of the two streets.

If the testimony of the appellee can be taken as true, the appellants' servant in operating the automobile, was guilty of negligence in running the machine on the left hand side of the street, and near the left curb, instead of the right, and in not turning around the intersection of the two streets, which was a violation of the traffic ordinance of the city of Joliet; and if the driver of the car had observed the requirements of the ordinance, the appellee would not have been struck, because she was beyond the point of the crossing, where the ordinance required appellant's car to turn into Arch Court. The failure of appellants' servant to observe the requirements of the ordinance, under this state of facts, would therefore be direct cause of appellee being struck and knocked down.

There is a conflict in the evidence, principally between the appellee and the driver of the automobile, as to the circumstances under which the accident happened; as to the manner in which the automobile was driven, the rate of speed, and the consequences to appellee; and the jury, who saw and heard the witnesses, were in the best position to properly determine which of these parties testifying, gave the most nearly correct and truthful version of the affair. C. C. Ry. Co. v Bork, 128 Ill. App. 357; Wabash Ry. Co. v Barrett, 117 Ill. App 315; The jury evidently believed the testimony of the appellee as to the manner in which the automobile was driven, and in determining the circumstances under which appellee was injured; and when considered in the light of all the other evidence in





the case, this court would not be warranted in saying that the jury were not justified in this conclusion. Viewed from this standpoint, the evidence fairly proves, that the appellants' servant violated the sections of the ordinance of the city of Joliet referred to, and that this negligence was the proximate cause of the injury to the appellee. Appellants' contention therefore, that the verdict is manifestly against the weight of the evidence, cannot be sustained.

It is true, however, that there is no evidence of a wanton or wilful violation of the ordinance; but this was not necessary as a basis for recovery, under the allegations of the declaration. There a declaration charges that a plaintiff was injured on account of a specific act of negligence, and also alleges that the act causing the injury was wanton and wilful proof of the negligence alone furnishes a sufficient basis for recovery. *Devine v Delano*, 272 Ill. 186; *Chicago & Grand Trunk Ry. Co. v Spurney*, 197 Ill. 471; *Weber Wagon Co. v Kehl*, 139 id. 644.

The question of whether or not the act of appellants' servant in running into the appellee was wilful and wanton, was not submitted to the jury under the instructions given; the contention of appellants, that the fourth instruction given for appellee, submitted the question to the jury; and that the instruction might have misled the jury into believing that if the ordinance had been violated by the driver of the automobile on the left hand side of the street and not around the intersection, that such violation of itself could be regarded as a wilful and wanton act, cannot be sustained, inasmuch as the instruction is expressly limited to negligence charged in the declaration; and by its terms could not have led the jury to believe that it referred to anything but that.



the case, this court would not be warranted in saying that the jury were not justified in this conclusion. Viewed from this standpoint, the evidence fairly raises the question whether the servant violated the duties of the ordinance of the city of Chicago referred to, and that this negligence was the proximate cause of the injury to the appellee. Appellants' contention, therefore, that the verdict is manifestly against the weight of the evidence, cannot be sustained.

It is true, however, that there is no evidence of a violation or willful violation of the ordinance; but this was not necessary as a basis for recovery, under the allegations of the declaration. There is no allegation charges that a plaintiff was injured on account of a negligent act of negligence, and also alleges that the act causing the injury was wanton and willful. Proof of the negligence alone is sufficient basis for recovery. *Davine v. Delano*, 378 Ill. 156; *Chicago & Grand Trunk Ry. Co. v. Spruay*, 187 Ill. 471; *Woburn Traction Co. v. Kell*, 105 Ill. 614.

The question of whether or not the act of appellants' servant in running into the appellee was willful and wanton, was not submitted to the jury under the instructions given; the contention of appellants, that the fourth instruction given for appellee, suggested the question to the jury; and that the instruction might have misled the jury into believing that if the ordinance had been violated by the driver of the automobile on the left hand side of the street and not around the intersection, that such violation of ordinance would be regarded as willful and wanton act, cannot be sustained, inasmuch as the declaration is expressly limited to negligence charged in the declaration; and by its terms could not have led the jury to believe that it related to anything but such.

Appellants complain of the refusal by the court, of two instructions requested by them, concerning the preponderance of the evidence; and in reference to the necessity of proof, that the appellee was in the exercise of due care for her own safety, as a necessary element upon which to base a recovery. It is apparent however, that the matters embodied in the instructions referred to, were fully contained in other instructions, which were given for the appellants. The two instructions referred to, would have been merely a repetition of what was already set out in these other instructions, and they were therefore properly refused.

Appellants also complain of the following in an instruction; "that while the number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of evidence, yet the preponderance of evidence in a case is not necessarily alone determined by the number of witnesses testifying to a particular fact or state of facts," etc. The words "and disinterested", referring to the witnesses, should have been omitted from the instructions but it does not appear that any injury could have resulted to the appellants, by this error; moreover, the fifth instruction given for appellants, states the rule on the same subject, with such clearness and accuracy, that the jury could not have been misled in any way by the use of the erroneous words in the instruction mentioned; the error, therefore, could not have been harmful to appellants, and was corrected by the fifth instruction.

Appellants also insist, that the amount of damages is excessive, and that the evidence shows the injuries received by the appellee were but slight. The evidence of the appellee's

Appellants complain of the error by the court, of the instructions requested by them, concerning the presentation of the evidence; and in reference to the necessity of error, that the appellee was in the exercise of the care for her own safety, as a necessary element upon which to base a recovery. It is apparent, however, that the matters embodied in the instructions referred to, were fully contained in other instructions, which were given for the appellants. The two instructions referred to, would have been merely a repetition of what was already set out in these other instructions, and they were therefore properly refused.

Appellants also complain of the following in an instruction; "that while the number of credible and disinterested witnesses testifying on one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of evidence, yet the preponderance of evidence in a case is not necessarily alone determined by the number of witnesses testifying to a particular fact or state of facts," etc. This is "undisputed", referring to the witnesses, should have been omitted from the instructions but it does not appear that any injury would have resulted to the appellants, by this error; moreover, the fifth instruction given for appellants, states the rule on the same subject, with such clearness and accuracy, that the jury could not have been misled in any way by the use of the foregoing words in the instruction mentioned; the error, therefore, could not have been harmful to appellants, and was corrected by the fifth instruction.

Appellants also insist, that the amount of damages is excessive, and that the evidence shows the injury received by the appellee was not slight. The evidence of the appellee's

family physician, who treated her, tends to prove that the appellee, as a result of the injuries which she received, had retroversion or retro-displacement of the womb, which is not curable except by means of a major operation; that he examined appellee shortly before the accident, and that the physical disorder did not exist before the accident; but did appear shortly thereafter; that the accident could have produced it, and it probably resulted therefrom. In view of this evidence as to the extent of the appellee's injuries, which the jury were warranted in believing as true, we do not regard the amount of the verdict and judgment as excessive.

We do not find any reversible error in the record, and the judgment is affirmed.

Judgment affirmed.



family physician, who treated her, told us that the  
 apoplexy, as a result of the injuries which she received,  
 had retrogression or retro-alteration of the word, which is  
 not curable except by means of a major operation; that he  
 examined apoplexy shortly after the accident, and that the  
 physical diagnosis did not establish the accident; but that  
 shortly after the accident; that the accident would have pro-  
 duced it, and it probably resulted therefrom. In view of this  
 evidence as to the extent of the apoplexy injuries, which  
 the jury were warranted in believing as true, we do not regard  
 the amount of the verdict and judgment as excessive.

We do not find any reversible error in the record, and  
 the judgment is affirmed.

JOSEPH W. WATKINS, JR.,  
 Plaintiff in Error.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



630

2555

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 19

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 6307

R. A. Young, appellee

vs

Appeal from Livingston.

Frank Gschwendtner, appellant.

Niehaus, P. J.

This is a suit in assumpsit brought by R.A. Young, the appellee, in the circuit court of Livingston County, against Frank Gschwendtner, to recover compensation for preparing certain plans and specifications for the construction of a dwelling house to be built on a farm near Pontiac. The declaration consisted of the common counts, to which the general issue was filed. There was a trial by jury, and a verdict finding the issues for the appellee, and assessing his damages at the amount claimed \$150; upon which the court rendered judgment, and an appeal was taken from this judgment to this Court.

The points upon which the appellee relies to reverse the judgment, are, first, that the judgment is contrary to the evidence; and, that the court erred in giving the second and sixth instruction for the appellee. It is not denied by the appellant, that he engaged the services of appellee, to draw plans and specifications for a dwelling he was contemplating to erect on his farm near Pontiac. There is a conflict of evidence as to the exact terms of the contract between the parties which was verbal; the appellant insisting that the price agreed upon was not payable until the blue prints and specifications were made to his satisfaction; while the appellee says, that he agreed that he would change the blue prints in any way suggested by the appellant until they were satisfactory. The evidence shows acceptance of the plans.

It is not disputed that the appellee drew the plans and specifications for the contemplated building. According to the

R. A. Young, appellee

vs

Frank Gschwendtner, appellant.

Nicholas, P. J.

This is a suit in assumpsit brought by R. A. Young, the appellee, in the circuit court of Livingston County, against Frank Gschwendtner, to recover compensation for preparing certain plans and specifications for the construction of a dwelling house to be built on a farm near Pontiac. The declaration consisted of the common counts, to which the general issue was filed. There was a trial by jury, and a verdict finding the issues for the appellee, and assessing his damages at the amount claimed, \$150; upon which the court rendered judgment, and an appeal was taken from this judgment to this Court.

The points upon which the appellee relies to reverse the judgment, are, first, that the judgment is contrary to the evidence; and, that the court erred in giving the second and sixth instruction for the appellee. It is not denied by the appellant, that he engaged the services of appellee, to draw plans and specifications for a dwelling, he was contemplating to erect on his farm near Pontiac. There is a conflict of evidence as to the exact terms of the contract between the parties which was verbal; the appellant insisting that the price agreed upon was not payable until the plans and specifications were made to his satisfaction; while the appellee says, that he agreed that he would make the plans within a very short time by the appellant until they were satisfactory. The evidence shows acceptance of the plans.

It is not disputed that the appellee drew the plans and specifications for the contemplated dwelling. According to the

evidence, they were completed and placed in the hands of contractors for the purpose of figuring on the contract to build the dwelling, but were then withdrawn at the instance of appellant, for the purpose of making certain changes which he wanted made; and some of these changes were made; but it is insisted by the appellant in his testimony, that he wanted a certain change made, and that appellee did not make it, nor offer to make it. Appellee's testimony is to the effect, that he offered to make any additional changes in the plans and specifications, which the appellant wanted, and was ready at all times to make them, but that appellant never specified the changes that he wanted, and therefore they were not made.

According to appellee's testimony he was not at fault because additional changes appellant said he wanted, were not made; but the fault rested with appellant in not pointing them out and there was a conflict of evidence between the appellant and the appellee, upon this question, and it therefore presented a proper question of fact for the jury to pass upon. The jury were in the best position to determine this question correctly by considering the testimony of the parties to the suit, whom they saw and heard, in connection with all the other evidence in the case. It is the province of the jury to determine the facts which are in dispute; and a court of review, under the circumstances presented in this case, would not be warranted in setting aside the finding of the jury; this court would not be justified in saying, that the jury should have believed the testimony of the appellant, rather than that of appellee.

We have carefully considered the contention of appellants concerning the instructions given to the jury; and are of opinion that when considered together, and as a whole, they state the law with substantial accuracy; and that there is no reversible error in the case on account of the instructions given.

The judgment is affirmed. Judgment affirmed.



evidence, they were completed and placed in the hands of contractors for the purpose of figuring on the contract to build the dwelling, but were then withdrawn at the instance of appellant, for the purpose of making certain changes which he wanted made; and some of these changes were made; but it is inadvisable for the appellant in his testimony, that he wanted a certain change made, and that appellee did not make it, nor offer to make it. Appellee's testimony is to the effect, that he offered to make any additional changes in the plans and specifications, which the appellant wanted, and was ready at all times to make them, but that appellant never specified the changes that he wanted, and therefore they were not made.

According to appellee's testimony he was not at fault because additional work as a tenant said he wanted, were not made; but the fault rested with appellant in not pointing them out and there was a conflict of evidence between the appellant and the appellee, upon this question, and it therefore presented a proper question of fact for the jury to pass upon. The jury were in the best position to determine this question correctly by considering the testimony of the parties to the suit, whom they saw and heard, in connection with all the other evidence in the case. It is the province of the jury to determine the facts which are in dispute; and a court of review, under the circumstances presented in this case, would not be warranted in setting aside the finding of the jury; this court would not be justified in saying, that the jury should have followed the testimony of the appellee, rather than that of appellant.

We have carefully considered the contention of appellant concerning the instructions given to the jury; and are of opinion that when considered to itself, and as a whole, they state the law with substantial accuracy; and that there is no reversible error in the case on account of the instructions given.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court.*





8308  
2356  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 20

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Gen. No. 6303.

William P. MacCracken, appellant.

vs

Appeal from DuPage.

First National Bank of Wheaton,

et al. appellees.

Niehaus, P. J.

This action of replevin was brought by the appellant, William P. MacCracken, in the Circuit Court of DuPage County, to recover from the First National Bank of Wheaton, and Alexander Metzel and M. E. Taylor, appellees, two bonds of the John R. Thompson Company, of the value of \$1,000 and \$500 respectively. The bonds were not obtained by the writ of replevin; and appellant therefore filed with his declaration a count in trover, under which a recovery was sought, for conversion of the bonds.

The case was tried by the Court, without the intervention of a jury, and the issues were found in favor of the appellees, and judgment rendered against the appellant for costs; from which judgment this appeal is taken.

It appears from the evidence, that C. E. Howard, about September 19, 1913, obtained a loan of \$1200 from the appellee First National Bank of Wheaton; and pledged the bonds in question, as collateral security; and that the appellant had loaned him the bonds for that purpose; the money borrowed, being represented by a promissory note for the sum mentioned, payable in ninety days after date. Following this transaction Howard became financially involved, and was adjudged a bankrupt, in December, 1913.

When the appellant became aware of Howard's bankruptcy he sought to obtain a return of his bonds from the appellee bank; and his son, William P. MacCracken, Jr. who was a lawyer, at once



Gen. No. 8308.

William P. MacCracken, appellant.

Appell from Dupage.

vs

First National Bank of Weston,

et al. appellees.

Memorandum, P. 3.

This action of replevin was brought by the appellant,

William P. MacCracken, in the Circuit Court of Dupage County,

to recover from the First National Bank of Weston, and

Alexander Metzel and M. E. Taylor, appellees, two bonds of the

John R. Thompson Company, of the value of \$1,000 and \$500

respectively. The bonds were not obtained by the writ of

replevin; and appellant therefore filed with his motion

a count in trover, under which a recovery was sought, for con-

version of the bonds.

The case was tried by the Court, without the intervention

of a jury, and the issues were found in favor of the appellees,

and judgment rendered against the appellant for costs; from

which judgment this appeal is taken.

It appears from the evidence, that C. E. Howard, about

September, 1918, obtained a loan of \$1500 from the appellees

First National Bank of Weston; and placed the bonds in ques-

tion, as collateral security; and that the appellant had

loaned him the bonds for that purpose; the money borrowed, being

represented by a promissory note for the sum mentioned,

payable in thirty days after date. Following this transaction

Howard became financially involved, and was obliged to con-

rupt, in December, 1919.

Upon the appeal, certain facts of Howard's bankruptcy

are sought to be shown in order to establish the appellees' case.

and his son, William P. MacCracken, Jr. who was a lawyer, at some

entered into negotiations with the officers of the bank with this object in view. He had several conversations with the cashier of the bank, M. B. Taylor; also with the president, James S Feironnet; and with Alexander Metzel, the vice president, for the purpose of arranging to pay the bank the amount due on the Howard note, and thereby obtain a release of the bonds.

It is well settled as a matter of law, that inasmuch as the appellee Bank had obtained the possession of and was holding the bonds legally, it was necessary that the appellant should make a legal tender of the amount due upon the note, to the appellee Bank, and a demand for the bonds, before replevin or trover could be successfully maintained. (O. & M. Ry. Co. v Noe, 77 Ill. 513; Clark vs Lewis, 35 Ill. 417; Wabash R. R. Co. v House, 101 Ill. App. 397; Rosenbaum v King, 114 Ill. App. 648; Chase Bros. v Connors, 133 Ill. App. 418; Freehill v Hueni 103 Ill. App. 118.)

The appellant claims however, that the legal tender and the demand necessary, were waived by action of the parties, because the appellee Bank agreed to accept other funds in place of legal tender money; and that the officers of the Bank informed William P. MacCracken, Jr. who was acting for the appellant, that they would not receive or take the amount due upon the note even if legally tendered, and surrender the bonds; and the real question involved in this controversy, therefore, is one of fact, - namely, whether the amount due upon the note was legally tendered; or whether, as appellant claims, such demand and tender were legally waived, by the action of the parties.

Upon this question, the record discloses a sharp conflict in the evidence, and it involves passing upon the credibility of the different witnesses who participated in the transactions and conversations which were had by the parties,

entered into negotiations with the officers of the bank with this object in view. He had several conversations with the cashier of the bank, M. B. Taylor; also with the president, James P. Tetonnet; and with Alexander Betail, a vice president, for the purpose of arranging to pay the bank the amount due on the Howard note, and thereby obtain a release of the bonds. It is well settled as a matter of law, that inasmuch as the appellee bank had obtained the possession of and was holding the bonds legally, it was necessary that the appellant should make a legal tender of the amount due upon the note, to the appellee bank, and a demand for the bonds, before reprieving or trover could be successfully maintained. (O. & M. Ry. Co. v. Noe, 77 Ill. 517; Clark vs Lewis, 85 Ill. 417; Kansas R. R. Co. v. Jones, 101 Ill. App. 357; Rosenbaum v King, 114 Ill. App. 548; Chase Bros. v. Conners, 188 Ill. App. 418; Freshill v Rhoads 103 Ill. App. 118.)

The appellant claims, however, that the legal tender and the demand necessarily, were waived by action of the parties, because the appellee bank agreed to accept other funds in place of legal tender money; and that the officers of the bank induced William F. MacGroschen, Jr. who was acting for the appellant, that they would not receive or take the amount due upon the note even if legally tendered, and surrender the bonds; and the real question involved in this controversy, therefore, is one of fact, - namely, whether the amount due upon the note was legally tendered; or whether, as appellant claims, such demand and tender were legally waived, by the action of the parties. Upon this question, the record discloses a sharp conflict in the evidence, and it involves questions of fact and credibility of the witness testimony which are not to be decided by the law, transactions and non-transactions which were not by the parties.



in reference to the matter. If the version of the appellees' witnesses is to be taken as the true version of the transactions and conversations between the parties, a demand and legal tender were not made and not waived; and it is clear that the trial court took this view of the matter, and found that no legal tender and no demand had been made; and that the appellee Bank was therefore entitled to hold the bonds, regardless of any other question arising in the case.

And the finding of a trial court upon a controverted question of fact, where the evidence is conflicting, is entitled to the same consideration as the verdict of a jury would be under the same circumstances; and a court of review is not warranted in setting aside such finding, unless it is clearly against the weight of the evidence. (*Burgett v Osborn* 173 Ill. 227; *Lane v Lessor*, 135 Ill. 573; *Chicago Trust & Savings Bank v Black*, 72 Ill. App. 147; *Snell v Cottingham*, 72 Ill. 161; *Coari v Olson*, 91 Ill. 273; *Adams v Squires* 86 Ill. App. 458; *Nimmo v Kuykendall*, 85 Ill. 476; *Somer v Elgin Condensed Milk Co.*, 87 Ill. App. 219.)

It was incumbent upon the appellant to establish the waiver of the demand and tender by a preponderance of the evidence. The record does not disclose that he did so, nor that the finding of the court upon the fact was against the weight of the evidence; apparently, the preponderance of the evidence does not show a proper demand nor a legal tender; nor that such demand and tender were waived by the appellees. The finding of the court was therefore proper; and the finding does not conflict with the propositions of law held by the court. We are of opinion that the propositions of law held by the court were correctly held.

We find no error in the record; the judgment is therefore affirmed.

in reference to the matter. If the version of the appellee's witnesses is to be taken as the true version of the transactions and conversations between the parties, a demand and legal tender were not made and not received; and it is clear that the trial court took this view of the matter, and found that no legal tender and no demand had been made; and that the appellee Bank was therefore entitled to hold the bonds, regardless of any other question arising in the case.

And the finding of a trial court upon a controverted question of fact, where the evidence is conflicting, is entitled to the same consideration as the verdict of a jury would be under the same circumstances; and a court of review is not warranted in setting aside such finding, unless it is clearly against the weight of the evidence. (See *att v Geborn* 173 Ill. 237; *Lane v Lacey*, 105 Ill. 375; *Chicago Trust & Savings Bank v Black*, 72 Ill. App. 147; *Snell v Cottingham*, 73 Ill. 181; *Court v Olson*, 91 Ill. 275; *Adams v Spence* 98 Ill. App. 438; *Nismo v Kuykenhall*, 85 Ill. 476; *Somer v Elgin Contract with* Co., 87 Ill. App. 316.)

It is incumbent upon the appellant to establish the waiver of the demand and tender by a preponderance of the evidence. The record does not disclose that he did so, nor that the finding of the court upon the fact was against the weight of the evidence; accordingly, the preponderance of the evidence does not show a proper demand and legal tender; nor that such demand and tender were waived by the appellee. The finding of the court was therefore proper; and the finding does not conflict with the propositions of law held by the court. We are of opinion that the propositions of law held by the court were correctly held.

We find no error in the record; the judgment is therefore affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



6312

2557

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 21

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 6312.

J. R. McDole, appellee

vs

Appeal from City Court Aurora.

German American National Bank  
of Aurora.      appellant.

Niehause, P. J.

This is a suit originally commenced before a justice of the peace, by the appellee, J. R. McDole, who was a depositor in the Bank of appellant. The suit was brought on a check which the appellee issued to Fred B. Shearer, on the 5th. day of August 1915, and which was payable to Fred B. Shearer, his attorney, for the sum of \$93.36, that being the balance claimed by the appellee to have remained to his credit on his deposit account, in appellant's bank. The check was presented for payment, by Sherer, to the Bank, and payment was refused, on the ground that there were no funds in the Bank to appellee's credit.

The testimony of John C. Weiland, assistant cashier in the appellant bank, is to the effect that on the 16th. day of April, 1915, a woman who was a stranger to him, and to the Bank, appeared at the Bank and presented for payment, a check drawn on the Riddell National Bank, of Riddell, Indiana, dated April 14, 1915, for the sum of \$90. which was payable to the order of Laura H. Haskell and signed by John M. Haskell; and that he inquired of the woman. if she knew of anyone in the city, who would endorse the check, so that the bank would be warranted in paying it. The woman replied that the appellee who was then standing next to her, was acquainted with her; and he thereupon turned the check over to appellee, and asked him if he would endorse ~~the same~~ his name upon it; and that

Gen. No. 6515.

J. R. McDevie, appellee

vs

German American National Bank

of Atlanta. Appellant.

Atlanta, P. J.

This is a suit originally commenced before a Justice of the Peace, by the appellee, J. R. McDevie, who was a depositor in the Bank of appellant. The suit was brought on a check which the appellee issued to Fred E. Wheeler, on the 25th day of August 1915, and which was cashed by Fred E. Wheeler, his attorney, for the sum of \$100.00, that being the balance standing by the appellee to his credit on his deposit account, in appellant's bank. The check was presented for payment, by Wheeler, to the Bank, but payment was refused, on the ground that there were no funds in the Bank to cash the check.

The testimony of John C. McDevie, assistant cashier in the appellant bank, is to the effect that on the 15th day of April, 1916, a woman who was a friend of his, and to the Bank, appeared at the Bank and requested for payment, a check drawn on the Atlanta National Bank, of Atlanta, Georgia, dated April 14, 1915, for the sum of \$100.00, which was payable on the order of Laura M. McDevie and signed by John R. McDevie; and that he inquired of the woman, if she knew of anyone in the city, who would cash the check, but that she would not warrant in paying it. The woman replied that the appellee, who was then standing next to her, was acquainted with her; and he thereupon turned the check over to the appellee, and asked him if he would cash the same. He then cashed it; and that

appellee said he would; and the cashier then handed appellee a pen, and the check was endorsed by appellee at that time, in his presence; the appellee signing his name upon the back of the check; and the woman signing the name of Laura H. Haskell below the name of appellee. Thereupon the amount of the check was paid to the woman and the bank. The following day the check was sent to a Chicago bank for collection; and through the Chicago Bank, on April 30th. the check was returned to the appellant bank marked "No account". He further testified, that upon the return of the check he telephoned to the appellee that the check had been returned unpaid, and asked him what he would do about it; whereupon appellee replied, that he would do nothing. The cashier thereupon informed the appellee, that the bank would charge his account with the amount of the check; and that after waiting until the 26th. of April, did charge the check to the account; also \$2.60 protest fees, which had been paid by the bank.

The appellee denied that he signed his name upon the check in question, and denied that he knew anybody by the name of Laura H. Haskell, the payee named in the check; and denied that he was in the bank at the time testified to by the cashier; and that the first knowledge he had of the transaction testified to by the cashier, was when he was notified of the return of the check, and the refusal of payment thereon by the bank at Riddell, Indiana. There was other proof also offered by the appellee, tending to show, that he was not in the bank at the time fixed by the testimony of the cashier. There was a trial by a jury, who returned a verdict in favor of the appellee, for \$93.36; and the court entered judgment upon the verdict, from which this appeal is taken.

The appellant contends, that the verdict of the jury was contrary to the evidence, and that the trial court should have granted a new trial upon the ground of newly discovered evidence;





the newly discovered evidence being set forth in an affidavit which the appellant offered in support of his motion for a new trial; and it sets forth that one Nicholas Steichen, was present in the bank at the time the check was endorsed by the appellee and saw the appellee endorse the check; and the affidavit of Nicholas Steichen states, that he was standing immediately back of the appellee, and an unknown woman, and that at that time and place he saw the unknown woman produce ~~ix~~ a check and ask the cashier to cash the same for her, and he heard the cashier say to the woman that she was not known, and that if she would get some one known to ~~xxx~~ him, to identify her, and to endorse the check, he would cash the same for her; and that he heard the woman say that she knew the appellee, and heard the woman ask the appellee if he would endorse his name upon the check, and that the appellee said he would; and that thereupon the cashier handed the check to appellee, and that he saw the appellee write upon the back of the check and hand the same back to the cashier; and that he then saw the cashier count out and pay the money to the woman.

One of the vital questions involved in this appeal, is whether or not the check in question is a foreign bill of exchange. A check is a bill of exchange drawn on a bank payable on demand. (Section 184, Negotiable Instruments Act.) And an Inland Bill of Exchange is a bill which is or on its face purports to be drawn and payable within this state. Any other bill of exchange is a foreign bill. (Section 128, Negotiable Instrument Act.)

The check in question appears to have been drawn or made in the State of Indiana, and endorsed in the State of Illinois. This makes it a foreign bill of exchange. (Sublette Exchange Bank v Fitzgerald, 168 Ill. App. 34.) And being a foreign bill of exchange, before an endorser thereon could be held under the



the newly discovered evidence again set forth in an affidavit which the applicant offered in support of his motion for a new trial; and it was held that one Nicholas Steichen, was present in the bank at the time the check was cashed by the cashier and saw the cashier when he cashed the check; and the affidavit of Nicholas Steichen states, that he was standing immediately back of the cashier, and saw the cashier when he cashed the check and saw the cashier to cash the same for her, and he heard the cashier say to the woman that she was not known, and that it was not her money, and he would cash the money for her; and that he heard the woman say that she knew the cashier, and that the cashier would cash the money if he would endorse his name upon the check, and that the cashier said he would; and that thereupon the cashier cashed the check for the woman, and that he saw the cashier write a note on the back of the check and send the same back to the cashier; and that he then saw the cashier count out and pay the money to the woman.

One of the vital questions involved in this case, is whether or not the check in question is a foreign bill of exchange. A check is a bill of exchange drawn on a bank payable on demand. (Section 184, Negotiable Instruments Act.) And an inland bill of exchange is a bill which is or on its face purports to be drawn and payable within the state. Any other bill of exchange is a foreign bill. (Section 185, Negotiable Instruments Act.) The check in question appears to have been drawn or made in the State of Indiana, and endorsed in the State of Illinois. This makes it a foreign bill of exchange. (Section 185, Negotiable Instruments Act.) And it is a foreign bill of exchange, before an indorser, because it was not made in the State of Indiana, and endorsed in the State of Illinois.

Negotiable Instrument Act, it is necessary to make proof that it was protested for non-payment, and the protest must be annexed to the bill or it must contain a copy thereof; and must be under the hand and seal of the notary ~~xxxix~~ making it. (Sections 151 and 152, Negotiable Instruments Act; Sublette Exchange Bank v Fitzgerald, supra.)

The appellant offered a paper purporting to be a notice of protest, executed in the state of Indiana. The offer was objected to by the appellee; the objection was sustained, and the paper ruled out; and the ruling out of the paper offered, is assigned for error. The paper which was ruled out, does not appear to be in the bill of exceptions; and we are therefore unable to pass upon its character or contents, or the question of its admissibility; but must assume that the court properly excluded it.

There is no evidence in the record, that the check in question, as a foreign bill of exchange, was protested as required by law, to charge an endorser with liability thereon. That being the condition of the proofs, there was no error in giving to the jury instructions 7 and 8 which are complained of by the appellant. These instructions correctly stated the law applicable to the evidence.

Appellant contends, that notice of the presentation for payment of the check in question, and refusal to pay the same, was not required to be proven in order to charge the endorser of this check, because the instrument was accommodation paper. It is sufficient to say in reference to this contention, that the evidence shows that the check in question was not endorsed by the endorser for his accommodation; and that if the check was endorsed by appellee, he endorsed it for the accommodation of some one else. It was therefore not accommodation paper



which made notice of protest unnecessary within the meaning of the law. (First Nat. Bank v Sandmeyer, 164 Ill. App. 98) But inasmuch as there is no proof in the case, that the instrument sued on was properly protested, as a foreign bill of exchange, as required by the statute, the appellee could not be held liable; and the jury properly found the issues in his favor and for the balance remaining to his credit in the appellant Bank, without deducting therefrom the amount of the check in question.

The newly discovered evidence, commented on by appellant did not present matter which would have entitled the appellant to recover. If such evidence were added to the evidence in the record, the proper proof of protest required by law, would still be lacking. It is evident therefore, that the newly discovered evidence did not furnish a sufficient legal ground for a new trial; and the motion for a new trial was properly denied.

The judgment is affirmed.

Judgment affirmed.



which could notice of protest unnecessary within the meaning

of the law. (First Nat. Bank v. Leffler, 184 Ill. App. 2d)

But inasmuch as there is no proof in the case, that the instru-

ment sued on was properly protested, as a foreign bill of ex-

change, as required by the statute, the appellee could not be

held liable; and the jury properly found the issues in his favor

and for the reasons remaining to his credit in the appellate

Bank, without resting thereon the amount of the check in

question.

The newly discovered evidence, commented on by appellant

did not present matter which would have entitled the appellee

to recover. If such evidence were added to the evidence in

the record, the proper result of protest required by law, would

still be lacking. It is evident therefore, that the newly

discovered evidence did not furnish a sufficient legal ground

for a new trial; and the motion for a new trial was properly

denied.

The judgment is affirmed.

Judgment affirmed.



STATE OF ILLINOIS, {  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

---

*Clerk of the Appellate Court.*



6316

2558

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice 204 I.A. 23

CHRISTOPHER C. DUFFY, Clerk

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 6316.

Agenda 61.

August C. Jahnke,  
Defendant in Error,

-vs-

Writ of Error to Circuit  
Court, Lake County.

Stanley Biolos, William A.  
Birk, and Birk Brothers  
Brewing Company, a Corporat-  
tion,  
Plaintiffs in Error.

NIEHAUS, P. J.

This is a suit brought by petition in equity to the circuit court of Lake county by August C. Jahnke, defendant in error, against plaintiffs in error, Stanley Biolos, William A. Birk, and Birk Bros. Brewing Co., a corporation, to enforce a mechanic's lien which the defendant in error claims to have against the premises described in the petition. The petition alleges that the defendant in error is by occupation a contractor and builder; and that on or about September 1, 1913, he made a verbal contract with the plaintiff in error, Stanley Biolos, to repair, alter and improve a saloon and dwelling house situated on the premises in question; that the premises were in the possession of Stanley Biolos under a contract of sale from the owners, William A. Birk and Birk Bros. Brewing Co., and that under said contract with Biolos defendant in error was to furnish, and did furnish all necessary materials and labor for repairing, altering and improving said building, and that Biolos agreed to pay therefor the sum of \$452, by the terms of said contract.

11. 11. 11.

11. 11. 11.

August C. Mink,  
Thompson, in error,

-vs-

Well of Water Co. Chicago  
Chicago, Ill. 11. 11. 11.

Stanley B. Mink, William L.  
Mink, and Mrs. Mink  
Brewing Company, a corporation  
Chicago, Ill.

Thompson in error.

11. 11. 11.

This is a writ of habeas corpus in error, to the

effect of which is to set aside the judgment of the  
court in error, against the plaintiff in error, Stanley B. Mink, et al.,

and to set aside the judgment of the court in error, against the

mechanic's lien which was obtained in error against the

plaintiff in error, Stanley B. Mink, et al., and to set aside the

judgment of the court in error in favor of the defendant in error,

Stanley B. Mink, et al., and to set aside the judgment of the court in error,

against the plaintiff in error, Stanley B. Mink, et al., and to set aside the

judgment of the court in error, against the plaintiff in error, Stanley B. Mink, et al.,

and to set aside the judgment of the court in error, against the plaintiff in error,

Stanley B. Mink, et al., and to set aside the judgment of the court in error,

against the plaintiff in error, Stanley B. Mink, et al., and to set aside the

judgment of the court in error, against the plaintiff in error, Stanley B. Mink, et al.,

and to set aside the judgment of the court in error, against the plaintiff in error,

Stanley B. Mink, et al., and to set aside the judgment of the court in error,

against the plaintiff in error, Stanley B. Mink, et al., and to set aside the

judgment of the court in error.

The petition also alleges that William A. Birk and Birk Bros. Brewing Co., knowingly permitted said Stanley Biolos to contract for the improvement mentioned, and the materials and labor used in making said improvement; that they authorized Biolos to make such contract with the defendant in error for the improvement; that defendant in error complied with his contract and completed the improvement in accordance with the terms thereof and that said Biolos and said William Birk, the plaintiffs in error, neglected and refused to pay for the same, and that therefore he is entitled to a lien on the premises in question.

The plaintiffs in error, William A. Birk and Birk Bros. Brewing Co., filed an answer denying that they or either of them knowingly permitted Biolos to contract for said improvement, and the materials and labor used in making the same, and denying that said Biolos was authorized by them, or either of them, to make said contract for said improvement.

The cause was referred to the Master, to hear the proofs and report his conclusions; and the Master reported that the defendant in error was entitled to a lien against the premises in question for the sum claimed; namely, \$452.; and the court thereupon entered a decree requiring plaintiffs in error to pay, and that in default of such payment decreed that the premises be sold to satisfy said lien; from which decree this appeal is taken.

The evidence taken in the case shows that the premises in question are situated in North Chicago, and consist of a house and lot, the house being a store building with four living rooms

The position with respect to the...  
Brewing Co., however, is...  
fact for the...  
used in making...  
made and...  
that...  
the...  
Biolos and...  
and...  
fitted to a film on the...

The... in error, ...  
Brewing Co., ...  
known...  
the...  
said Biolos...  
said contract...

The...  
and...  
element in error...  
question...  
person...  
and...  
old...  
t...  
The...  
question...  
and...

The...  
question...  
and...



in the rear. The property is owned by Birk Brothers Brewing Co., a corporation, doing business in the city of Chicago, forty miles distant from the premises, but legal title to the premises was held in the name of William A. Birk, who was president of the Birk Brothers Brewing Co.; that about two years before the filing of the petition referred to, the Birk Brothers Brewing Co., made a contract with the plaintiff in error, Stanley Biolos, for the sale of the premises to him in consideration of \$1250, to be paid in installments, \$100 to be paid in cash, \$200 on May 1, 1911, and \$20 on the first of each month from May 1, 1911, until paid, and that Biolos went into possession under this contract and was holding the premises under it at the time of the making of the contract with the defendant in error; that at the time of making the contract there was a balance remaining due on the purchase price of about \$600.

Biolos wanted to raise the building and construct another story under it. He went to Chicago to see the owners about getting a loan for this purpose, and talked with William A. Birk concerning such a loan; according to the evidence, which is not disputed, he was told by Birk, acting on his own behalf, and for the Brewing Company, that they would not make any loan to him for that purpose; and further, not to make any improvements on the property. Biolos afterward informed Birk that he had made arrangements to procure a loan from Mr. Edwards, and was going to pay the Brewing Company off; and wanted the abstract sent to Edwards, which was done. Mr. Birk also testified that he again told him not to make any improvements unless he had the money to make them. Birk also testified that he did not know that any improvements were going to be made on the building until Biolos came to him and asked for a loan of \$150, to pay off some men who had been at work putting in a concrete foundation under the building; that Biolos at that time informed him that he



in the rear. The property is owned by John J. ...  
a corporation, having been in the city of ...  
distant from the premises, and being ...  
in the name of William A. ...  
Brewing Co.; that about ...  
referred to, the ...  
plaintiff in error, ...  
him in consideration of ...  
paid in cash, \$100 on ...  
from May 1, 1911, until ...  
and ...  
time of the making of the ...  
at the time of ...  
on the ...

Elaborate ...  
story under it. ...  
a loan for this purpose, ...  
such a loan; according to the ...  
and told by ...  
Company, that they would not ...  
and further, not to ...  
afterward informed ...  
loan from ...  
and wanted the ...  
also testified ...  
unless he had the ...  
did not know ...  
building would ...  
pay off ...  
under the building; ...

could not get the \$150 on the loan which he was to get from Edwards and therefore wanted Birk to help with the loan so that the men could be paid off. Birk testified that he again told Biolos not to put any more money into the property, that it wasn't in his name; that he did not own it, but only had a contract for it and not to make any improvements.

The evidence shows that after these conversations with Birk Biolos made the contract with the defendant in error. It does not appear that the owners of the property were at any time at or near the premises while the alleged improvements were being made, and there is nothing in the record which conflicts with Mr. Birk's testimony that he did not see the premises or know of the so-called improvements having been made until at least ninety days after they had been completed. There is no evidence whatever that William A. Birk, or Birk Brothers Brewing Co., at any time, consented to the contract made with the defendant in error, or approved it; nor that William A. Birk or the Birk Brothers Brewing Co., ever approved of or consented to the work that was done, nor the furnishing of materials.

The basis upon which the defendant in error seeks to hold the premises liable for the enforcement of his lien as alleged in his petition, is that William A. Birk and the Birk Brothers Brewing Co., knowingly permitted the making of the contract in question. This is a material allegation, and it was necessary for the defendant in error to prove it; not having done so, he is not entitled to the lien claimed. The decree which finds that defendant in error was entitled to mechanic's lien against the premises in question and enforcing it by directing a sale of the premises is therefore erroneous.

[illegible]

A number of other questions are raised on this appeal with reference to the admissibility of evidence adduced before the Master, and concerning other directions in the decree with reference to the payment of any surplus remaining after sale of the premises, but in view of the conclusion hereinbefore stated it is unnecessary to discuss or pass upon the questions raised.

The decree is reversed.

Decree reversed.

A number of other questions in regard to this appeal arise.

reference to the defendant's 2 witness names before the jury, and concerning other questions in the record and evidence in the payment of any such law suit, and in the event, and in view of the conclusion reached, it is impossible to discuss or even upon the question raised.

The issue is reversed.

Very truly,  
Yours,  
J. H. H. H.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



6269

2560

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 53

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures  
following, to-wit:



The People of the State  
of Illinois,

Defendant in Error,

-vs-

Error to Bureau.

Charles Buckman,

Plaintiff in Error.

CARNES, J.

Charles Buckman, plaintiff in error, herein after called the defendant, was engaged in the junk business at Spring Valley, Illinois. Charles Eisentrager broke into the power house of the Western Sand and Gravel Company and stole some insulated copper wire, a brass lubricator, and a controller handle, burned the insulation off the wire, burned and broke the controller handle and the lubricator to prevent identification, and then took this property to the defendant and sold it. The defendant was indicted, charged with the offense of receiving stolen property( Criminal Code, Sec. 239, J.& A. 3892 ) described in each of the two counts in the indictment as forty pounds of copper wire of the value of 18 cents per pound; one lubricator of the value of \$5.00; one controller handle of the value of \$6.00; five pounds of brass ~~fittings~~ of the value of 70 cents; five pounds of brass fittings of the value of 75 cents, averred in each count to be of the goods and chattels of the Western Sand and Gravel Company, described in one count as a corporation, organized and incorporated under and by virtue of the laws of the state of Illinois, and in the other count ~~as~~ a corporation, without stating how or where it was incorporated. [The verdict was as follows:- " We, the jury find the defendant, Charles Buckman, guilty of receiving stolen property, knowing the same to be





stolen, for the defendant's own gain and to prevent the owner from again possessing the same, in manner and form as charged in the indictment and we further find from the evidence the value of the property so recovered to be Three Dollars and Fifty Cents. And we further find from the evidence that the age of the Defendant is 40 years." ( The word "recovered" should have been "received". ] The mistake was probably a clerical error.) There was a judgment of \$25.00 fine and costs of suit, and that the defendant be confined in the county jail "for and during the period of thirty days from and after this date, and that he be thereafter discharged."

The judgment was in error and should be confined from said date to the date of the judgment.

The defendant brings the case here on a writ of error, and argues that the verdict does not find the value of the property "received", bought or concealed by him, and therefore is not responsive to the issues and no judgment should have been rendered upon it. The clerical error or the mistake in the use of the word was not called to the attention of the court on the motion for a new trial. Defendant's counsel was expressly requested to state reasons in support of the motion, and did state his reasons, not including this one. It was probably not then noticed by either court or counsel. We think a reading of the entire verdict leaves no question that the jury found the sum named to be the value of the property received. The verdict should be liberally construed and all reasonable intendments indulged in its support. People v Brown, 273 Ill.169,177, and cases there cited. Under the rule there announced the verdict was sufficient.

It is assigned as error that the judgment is contrary to law, and our attention is directed to that clause of the judgment that fixes the imprisonment to begin at the date of the judgment. That

After this date, the land was in the hands of the  
the county jail, and the same was sold to the county for \$100.00  
\$100.00 fine and costs, and the same was sold to the county for  
mistake was probably a clerical error. There was a balance of \$100  
years. (The same "mistake" should have been corrected.) The  
further find that the same was sold to the county for \$100.00  
terry so received to the same amount and the same was sold to the  
dictant and the same was sold to the county for \$100.00 and the same  
again possessing the same, in payment and the same was sold to the  
stolen, the same was sold to the county for \$100.00 and the same was

The defendant, being in a well known and  
and agrees that he is not a member of the  
erty "received", should be considered as  
responsive to the law and no judgment should be made  
upon it. The defendant is in the same position  
was not called to the attention of the court in the  
new trial. The defendant is not a member of the  
persons in support of the motion, and the court, not  
including this one. It is respectfully suggested that  
court or jury. The defendant is in the same position  
no question as to the fact that the defendant is in the  
property received. The defendant is in the same position  
all returns of the defendant's property to its owner, and  
was in 1917, 1918, 1919, and 1920. The defendant is in the same  
position the defendant is in the same position.

was error. The judgment should not have fixed the day or hour at which it should begin or end. *Johnson v. The People*, 83 Ill. 431. But if there are no other errors in the record the cause should be remanded for a proper sentence as held in *People v. Elliott*, 272 Ill. 592, 603, following *Johnson v. The People*, supra.

It is argued that the evidence does not support the allegations that the Western Sand and Gravel Company was a corporation. Section 486 of our criminal code provides that in all criminal prosecutions involving proof of the legal existence of a corporation user shall be prima facie evidence of such existence. Under this statute proof of user is competent whether the corporation is domestic or foreign. *Kincaid v The People*, 139 Ill. 213, 216. Proof of the defacto existence of a corporation by reputation or otherwise, is admissible. *Kossakowski v. The People*, 177 Ill. 564; *Graff v. The People*, 208 Ill. 312. In the present case the people proved that the company was conducted by a president, secretary, treasurer, and manager; that it had a superintendent; that there were stockholders, naming some of them, and a board of directors; and that it had been in existence six or seven years. Also, that it was operated as a corporation; but that last item of proof was stricken out on motion of the defendant. This question is discussed in *People v. Struble*, 275 Ill. 162, and we are of the opinion that the proof above indicated showed the exercise of corporate powers and functions, and met the requirements of the statute above quoted.

The defendant claims a variance between the description of the articles of property in the indictment and in the proof, and insists, without citing authority, that it was necessary to







prove the description, quantity and price of each article as alleged, as for instance: the exact number of pounds of wire and the value per pound. It is elementary law that the number of articles charged to be stolen and the value thereof need not be proven unless it is matter of description. There must be proof that the articles have some value, but not necessarily the value alleged in the indictment. It is material whether the value of the articles were or not more than \$15.00, but if found over or under that sum it is not material in what amount, and if the jury found the defendant guilty as to a part of the articles charged in the indictment, it was not necessary to support the judgment that the verdict should find him guilty as to the other articles charged. McClain on Criminal Law, Sec.723; Underhill on Criminal Evidence, Sec.298; Bishop's New Crim.Proc.Second Edition, Vol.2, page 406; and Vol.3, page 1674. Under the rule announced in these text books there was no variance between the allegations and proof in regard to the copper wire. It is not necessary to consider whether the proof failed as to some of the other articles. If, as the defendant contends, there was no proof of the receipt of the other articles; as for instance, the controller handle because it was not a controller handle but only pieces of metal when received, it only presents the familiar condition of an indictment sustained by proof of the taking of a part only of the property charged to be stolen, or received.

The witness Eisentrager was permitted to testify that he, before the time in question, repeatedly sold stolen property to the defendant, but as to these several transactions he did not expressly say that the defendant at the time knew he was purchasing stolen property. Defendant's counsel contend that under the

prove the description, jewelry and value of each article as shown  
for instance: the money found in the pocket of the victim  
her own. It is unnecessary to say that the money was  
to be stolen and the value shown on the receipt is  
master of the property. But it is not necessary to say that the  
have some value, but not necessarily the value shown in the in-  
disposal. It is not necessary to say that the value shown is  
not more than \$10.00, and it is not necessary to say that the  
not material in this case, as the fact that the value shown  
guilty as to a part of the property shown in the indictment,  
it was not necessary to say that the judgment was the verdict of a jury  
find this value as to the other articles charged. See also  
Criminal Law, Sec. 101; Criminal Evidence, Sec. 101;  
Bishop's New Criminal Law, Sec. 101; and Vol. 1,  
page 101. Under the rule mentioned in the first book there  
was no variance between the indictment and the facts in regard to the  
copper wire. It is not necessary to say that the value shown  
lied as to some of the other articles. It is the fact that  
contents, there was no fraud in the receipt of the other articles; and  
for instance, the receipt for the value shown is not a receipt  
liable but only a receipt of value shown received, it is not necessary  
the further provision of an indictment charged by proof of the  
taking of a part of the property shown in the receipt, as  
received.

The witness Alexander was permitted to testify that he  
before the time he gave it, received it from the owner of the  
the defendant, but as to these articles the defendant is not  
expressly say that the defendant is the owner of the property  
stolen property.

rule stated in *People v Fryer*, 266 Ill. 216, it was error to permit proof of other sales of stolen property unless it also appeared that the defendant knew at the time it was stolen. This may be so. The purpose of that character of testimony, when properly admitted, is to show the defendant's knowledge and intent. In the present case it appeared without contradiction that Eisentrager was, before the time in question, instructed by the defendant if he got any insulated copper wire to "burn it off so they cannot identify it." This undisputed testimony leaves no question that the defendant knew he was buying stolen property of the witness, and makes harmless any error in specific proof as to the various items that had been purchased before the time in question.

Defendant offered instructions which the court refused that there was no proof as to various items of property charged in the indictment. For reasons before stated it was not error to refuse those instructions.

Defendant's refused instruction No. 40 was on the question of reasonable doubt, and might properly have been given except that it was sufficiently covered by other instructions given on that subject. No. 41 was to advise the jury of the difference in measure of proof required in civil and criminal cases. It stated the law and might with propriety be given, but it was not error to refuse to inform the jury what the law is in civil cases. No. 43 was to tell the jury that in doubtful cases evidence of previous good character of the party charged with crime is conclusive in favor of the defendant. It is substantially the same as the instruction held properly refused in *Guzinski v. The People*, 77 Ill. App. 275. The rule is, as stated in that case, that evidence of good character

[illegible]

the indictment. The instant offense is not a petty offense those instances.

[illegible]



is proper to be considered by the jury in connection with all the other evidence in the case in passing on the question of the guilt or innocence of the defendant. It was there said not to be the duty of the court to instruct the jury that if they have any doubt, however whimsical, it is their sworn duty to find the defendant not guilty if good character has been proved. If, independent of the evidence of good character, there is a reasonable doubt of the defendant's guilt, he should be acquitted. Evidence of good character may or may not be sufficient, when weighed with all the other evidence in the case, to raise a reasonable doubt in the minds of the jury of the defendant's guilt. If it does, he should be acquitted. If it does not, he should be convicted. There is little, if anything, to be gained by trying to separate that evidence from the other evidence to be considered by the jury. It cannot, in and of itself, as matter of law, be conclusive in favor of the defendant. The instruction was properly refused.

Complaint is made of the people's instructions. They were for the most part stock instructions many times given and approved, and no longer open to discussion. By the 9th given instruction the jury were told that if at the time the defendant received the property the circumstances presented and manifested to him were such as to have caused him, or any man of ordinary observation, "to know and to believe" and the defendant "did know and believe" that the property was stolen, etc., then it was not necessary that the defendant saw the goods stolen or was told that they had been stolen. The point made on this instruction is in the clause "know and believe", which is said to be illogical. Whatever else may be said of this criticism the language did not harm the defendant. The jury were required to find on that





subject that he both knew and believed that the articles purchased were stolen property. We see no prejudicial error in that instruction. The instructions, as a whole, were more favorable to the defendant than he could properly ask, and we find no material error of the court in passing on any of them.

Defendant in his argument places great stress on the fact that the witness, Eisentrager, was a convicted thief; but his testimony was for the most part uncontradicted, and there was other credible, uncontradicted testimony in the case that clearly established the defendant's guilt. A reading of the entire record leaves no doubt whatever that he was guilty as charged.

Finding no substantial error in the record up to the imposition of the sentence the judgment is reversed and the cause remanded to the circuit court with leave to the state's attorney to move for, and direction to the court to enter, a judgment in accordance with the rule established by the supreme court in *The People v. Elliott*, supra.

Reversed and remanded with directions.

subject that he both knew and believed that the witness concerned  
were stated properly. He sees no prejudicial error in the in-  
struction. The instructions, as a whole, were more favorable  
to the defendant than he would properly say, and we find no  
error of law in the instructions on any of them.

Defendant in his argument made great stress on the fact  
that the witness, Bickel, was a convicted thief; but his  
testimony was for the most part uncontradicted, and there was other  
credible, uncontradicted testimony in the case that clearly es-  
tablished the defendant's guilt. A reading of the entire record  
leaves no doubt whatever that he was guilty as charged.

There is no substantial error in the record up to the in-  
position of the sentence the judgment is reversed and the cause re-  
manded to the district court with leave to the state's attorney to  
move for, and direction to the court to enter a judgment in ac-  
cordance with the rule established by the supreme court in the  
People v. Elliot, supra.

Reversed and remanded with directions.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*





6522

2562

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk. 204 I.A. 61

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Sterling Wholesale Grocery  
Company, a Corporation, *Appellee*  
-Plaintiff,

-vs-

Appeal from Lee.

L. H. Risetter and J. W.  
Rhoads, partners doing business  
under the firm name and style  
of Risetter & Rhoads,  
Defendants.

CARNES, J.

This is a suit in assumpsit brought by appellee, Sterling Wholesale Grocery Company, a corporation, against L. H. Risetter, the appellant, and J. W. Rhoads, as partners, to recover \$515.55 the price of merchandise alleged to have been sold and delivered to them. Rhoads defaulted. Risetter appeared and denied that there was a partnership or any liability as to him. There is no question as to the amount of the bill. A jury trial resulted in a judgment against both defendants on a verdict for the full amount, from which Risetter prosecutes this appeal.

It appears without dispute that Risetter is the son-in-law of Rhoads; that about June, 1914, a stock of goods in a store at Scarboro, Illinois, was purchased by Rhoads, or Risetter & Rhoads that Rhoads was an experienced merchant, and Risetter was not; that Risetter furnished the capital or most of it, and Rhoads attended to the business of buying and running the store. Risetter lived in the vicinity but is not shown to have done anything in the way of buying or selling goods or in the active management of the business affairs. Letter heads, bill heads, and sales slips were used bearing the firm name. Goods were ordered, shipped, and settled for, and advertising matter put out in that name, and

Sterling Wholesale Grocery  
Company, a corporation,  
Chicago, Illinois.

Verdict for \$100.00.

-vs-

I. E. Rissetter and J. E.  
Rhodes, partners doing business  
under the firm name and style  
of Rissetter & Rhodes,  
Chicago, Illinois.

Defendants.

CARMS, J.

This is a suit in remount brought by Sterling  
Wholesale Grocery Company, a corporation, against I. E. Rissetter,  
the appellant, and J. E. Rhodes, as partners, to recover \$100.00  
the price of merchandise alleged to have been sold and delivered  
to them. Rhodes testified. Rissetter appeared and denied that  
there was a partnership or any liability on his part. There is  
no question as to the amount of the bill. A jury trial resulted  
in a judgment against both defendants on a verdict for the full  
amount, from which Rissetter procured a writ of certiorari.

It appears without dispute that Rissetter is the owner-lessee  
of the store; that about June, 1911, a large quantity of goods in a store at  
Newbury, Illinois, was purchased by Rhodes, as stated in the record;  
that Rhodes was an experienced merchant, and together with Rissetter  
that Rissetter furnished the capital or part of it, and Rhodes  
attended to the business of buying and selling the goods. Rissetter  
lived in the vicinity but he did not have any business in  
the way of buying or selling goods as in the active management  
of the business. Rhodes was the active manager, and Rhodes  
also was the one who was in the store. Rhodes was the one who  
and acted for, and represented Rissetter and Rhodes in the store, and

Risetter knew these facts. Appellee at different times from June 1914, to January 1916, furnished the goods in question to the store on orders in the name of Risetter & Rhoads, shipped and billed in that name, and sent statements of account and received checks in partial payment in that name. Risetter had in his house a calendar advertising the business in the name of Risetter & Rhoads.

One witness testified that during the time in question Risetter told him that he had an interest in the store with Rhoads. Another that he heard Risetter say he had an interest in the store. Another that he was introduced by Rhoads to Risetter, who then stated that Risetter was interested in the business. Another that he heard Rhoads introduce Risetter to a traveling man, saying he was interested in the firm. L.B. Whiffin, the manager of appellee, testified that he was assisting in an invoice of the goods at the time they were taken over at Scarborough, and at that time Rhoads gave him an order for goods, and when asked who the goods should be shipped to stated in the presence of Risetter that the firm would be Risetter & Rhoads; that Risetter had the capital and he, Rhoads, had the experience. One A.E. Bennett, testified that he was present and heard that conversation between Rhoads and Whiffin. Each witness swears that Risetter was within hearing distance, and if he had normal hearing heard the conversation. They each testify that he said nothing. (There is no evidence that he did not have normal hearing.) Risetter denies that he heard any such conversation between Rhoads and Whiffin, and denies the above mentioned statements by him, or in his presence that he had an interest in the business. We are of the opinion that the evidence compelled a finding by the jury that Risetter did hear



Risetter knew these facts. Specimens at different times from June 1914, to January 1916, furnished the goods in question to the store on orders in the name of Risetter & Rhoads, shipped and billed in that name, and sent statements of account and received checks in partial payment in that name. Risetter had in his name a London advertising the business in the name of Risetter & Rhoads.

One witness testified that during the time in question Risetter told him that he had an interest in the store with Rhoads. Another that he heard Risetter say he had an interest in the store. Another that he was introduced by Rhoads to Risetter, who then stated that Risetter was interested in the business. Another that he heard Rhoads introduce Risetter to a traveling man, saying he was interested in the firm. L.M. Griffin, the manager of the store, testified that he was assisting in an invoice of the goods at the time they were taken over at Boston, and at that time Rhoads gave him an order for goods, and when asked who the goods should be shipped to stated in the presence of Risetter that the firm would be Risetter & Rhoads; that Risetter had the capital and he, Rhoads, had the experience. One A.J. Bennett testified that he was present and heard that conversation between Rhoads and Griffin. Each witness asserts that Risetter was within hearing distance, and if he had normal hearing heard the conversation. They each testify that he said nothing. (There is no evidence that he did not have normal hearing.) Risetter denies that he heard any such conversation between Rhoads and Griffin, and denies the above mentioned statements by him, on the ground that he had an interest in the business. He is of the opinion that the evidence compelled a finding by the jury that Risetter did have

the conversation between Rhoads and Whiffen, did know that goods were to be furnished by appellee on the strength of that statement, and his financial responsibility, and that a contrary finding could not have been sustained. Unless there is substantial, prejudicial error of law there is no question that the judgment should be affirmed. A contrary judgment would have been so manifestly against the weight of the evidence as to require a reversal.

The court, at the instance of the plaintiff, instructed the jury that if Risetter voluntarily and knowingly allowed and permitted the business of the alleged firm of Risetter & Rhoads to be conducted in such a way as to reasonably justify the public generally, and persons dealing with the alleged firm, in believing that he was a member of the firm, and that the plaintiff before and at the time they sold the goods had reasonable grounds for believing, and did believe from the manner in which the business was conducted, that he was a member of the firm, then they had a right to hold him liable as a member of the firm. At the instance of Risetter he instructed the jury that he could not be held liable for goods sued for unless he made some representation to the plaintiff, or committed some act, or failed to speak or act in such a way as to deceive the plaintiff and cause the plaintiff to have the reasonable belief that he was in fact a partner with Rhoads. Risetter asked an instruction to the effect that if he was not a partner and never held himself out or represented himself to be such partner, the verdict should be for the defendant, even though the jury should believe from the evidence that Rhoads, without the knowledge or consent of Risetter, represented to the plaintiff and others that Risetter was his partner and was jointly liable with him for bills that he might contract in the course of

the conversation between Rhoads and Rissett, did know that goods were to be furnished by appellee on the strength of that statement, and his financial responsibility, and that a contrary finding could not have been sustained. Unless there is substantial prejudicial error of law there is no question that the judgment should be affirmed. A contrary judgment would have been so manifestly against the weight of the evidence as to require a reversal.

The court, at the instance of the plaintiff, instructed the jury that if Rissett voluntarily and knowingly allowed and permitted the business of the alleged firm of Rissett & Rhoads to be conducted in such a way as to reasonably justify the public generally, and persons dealing with the alleged firm, in believing that he was a member of the firm, and that the plaintiff before and at the time they sold the goods had reasonable grounds for believing, and did believe from the manner in which the business was conducted, that he was a member of the firm, then they had a right to hold him liable as a member of the firm. At the in-

stance of Rissett he instructed the jury that he could not be held liable for goods owed for unless he made some representation to the plaintiff, or committed some act, or failed to speak or act in such a way as to deceive the plaintiff and cause the plaintiff to have the reasonable belief that he was in fact a partner with Rhoads. Rissett asked an instruction to the effect that if he was not a partner and never held himself out or represented himself to be such a partner, the verdict should be for the defendant, even though the jury should believe from the evidence that Rhoads, without the knowledge or consent of Rissett, represented to the plaintiff and others that Rissett was his partner and was jointly liable with him for bills that he might contract in the course of



such business. The court modified and gave this instruction by inserting the qualification if Risetter did not knowingly allow and permit the business to be conducted in such a way as to reasonably justify the public generally, and persons dealing with the alleged firm, in believing that he was a member of the alleged firm, and refused instructions offered by the defendant to the effect that it was not material what Rhoads represented to the public, even with the knowledge of Risetter, if those representations did not reach the plaintiff and were not acted upon by them.

Appellant claims that even if he held himself out or permitted himself to be held out to be the partner of Rhoads, that does not make him so in fact, or render him liable, as such, except as to those who were misled by such holding out, and who have extended credit on the strength of the supposed relation, citing 30 Cyc.384, and Hefner v Palmer, 67 Ill. 161; that it is immaterial what the community and general public may have believed and understood if the persons dealing with the alleged partners were not misled by their acts, citing Mellor v Carithers, 63 Ill.App. 579; and Thompson v First National Bank of Toledo, 111 U.S. 529. We agree with ~~the~~ appellant in this construction of the law. It was correctly stated to the jury in appellant's given instruction above noted, and the jury could not have been misled by appellee's given instruction read in connection with that instruction. It was not error to refuse to repeat the instructions to that effect offered by appellant. The court should not have modified defendant's instruction as above noted. As modified it was inconsistent with the other instructions given. But as we are of the opinion, as before stated, that but one reasonable conclusion can be reached from the evidence, we are not inclined to reverse the judgment

such business. The court admitted that such a restriction by  
imposing the qualification of Master did not necessarily allow  
and permit the business to be conducted in such a way as to  
reasonably justify the public generally, and persons dealing with  
the alleged firm, in believing that he was a member of the alleged  
firm, and refused instructions offered by the defendant to the effect  
that it was not material what Knolls represented to the public, even  
with the knowledge of Master, if those representations did not  
reach the plaintiff and were not acted upon by them.

Appellant claims that even if he held himself out or im-  
mited himself to be held out to be the partner of Knolls, he does  
not make him to in fact, or render him liable, as such, except as  
to those who were misled by such holding out, and who have extended  
credit on the strength of the supposed relation, citing 50 Cyc. 234,  
and *Hether v Palmer*, 17 Ill. 161; that it is immaterial what the  
community and general public may have believed, and immaterial if  
the persons dealing with the alleged partners were not misled by  
their acts, citing *Heller v Gertner*, 53 Ill. App. 179; and  
*Thompson v First National Bank of Toledo*, 111 U.S. 376. He agrees  
with the appellant in this contention of the law. It was cor-  
rectly stated to the jury in appellant's given instruction 20-ve  
notes, and the jury could not have been misled by appellee's given  
instruction read in connection with that instruction. It was not  
error to refuse to repeat the instructions to that effect stated  
by appellant. The court should not have modified defendant's  
instruction as above noted. It modified it in inconsistent with  
the other instructions given. But as to the law of the subject, as  
before stated, that the reasonable construction was reached  
from the evidence, we are not inclined to reverse the judgment.



because of this error.

We see no substantial error in the rulings of the court on the evidence. While the evidence does not establish the allagation that Risetter was in fact partner as between him and Rhoads, yet that was an issue in the case upon which each party had a right to introduce testimony. Of course, his own statements that he had an interest in the business were competent evidence, as were also the statements of Rhoads made in his presence, and also we think the acts of Rhoads in advertising and conducting the business in that name, so far as the evidence shows, that Risetter was familiar with what was done and acquiesced in it either by words or acts, or by silence at times when he would naturally be supposed to speak if he did not acquiesce in what Rhoads was doing.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

because of this error.

We see no substantial error in the finding of the court on the evidence. While the evidence does not establish the allegation that Rieatter was in fact partner or between him and Rhoads, yet that was an issue in the case upon which each party had a right to introduce testimony. In course, his own statements that he had an interest in the business were competent evidence, as were also the statements of Rhoads made in his presence, and also we think the acts of Rhoads in advertising and conducting the business in that name, so far as the evidence shows. That Rieatter was familiar with what was done and cognized in it either by words or acts, or by silence at times when he would naturally be expected to speak if he did not recognize in what Rhoads was doing.

Finding no reversible error in the record the judgment is

affirmed.

Reversed.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



6365

2566

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice 204 I.A. 82

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



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Gen. No. 6369.

Ag. No. 38.

A. T. Scovill,  
Appellant,

-vs-

Appeal from Whiteside.

Albert C. Lange,  
Appellee.

CARNES, J.

A bridge was washed out and destroyed August 2, 1915, on a State Aud Road leading south from Morrison, Illinois. Albert C. Lange, the appellee, was one of the highway commissioners of the township where it was located, and, as such commissioner, caused a temporary bridge to be made so that public travel would leave the highway about seventy or eighty feet south of the embankment of the old bridge and proceed to and across the temporary bridge. He caused a railing about twelve feet long and four feet high to be placed about ten feet south of the washout to prevent travelers from driving into the open space. This work was completed on August 9, and on the evening of that day, after dark, A. T. Scovill, the appellant, was driving his automobile north on that road at the rate of about fifteen miles per hour.. He did not see the railing and did not know of the washout until he was so near that he could not stop his car, and it struck the barricade, passed through it, and went into the ditch, injuring him. He brought this suit against appellee, as an individual, to recover for that injury, charging in his declaration that appellee, as highway commissioner, had charge of the road at the point in question and owed a duty to the public and the plaintiff to erect



sufficient barricades and signs of danger to prevent accidents; that he failed to perform that duty, and "because of gross negligence and carelessness on the part of defendant" the plaintiff was injured, etc. The general issue was plead, and at the close of the plaintiff's evidence the court, on motion of the defendant, directed a verdict of not guilty. Judgment was entered thereon, from which this appeal is prosecuted.

The court stated in ruling on the motion to direct the verdict that it was based on two contentions: First, That the highway commissioners have no jurisdiction over State Aid Roads and no duty to keep them in repair. Second, That even conceding such jurisdiction and duty to care for State Aid Roads in cases of emergencies like this, still the defendant was not shown guilty of any actionable negligence. The court said he did not agree with the defendant's first suggestion, but as to the second was of the opinion on the authority of *Nagle v. Wakey*, 161 Ill. 387, that the defendant, as highway commissioner, was required only to use his judgment as to the manner of protecting travelers from danger from the opening; that reasonable men might differ as to the manner of protection; Fifty men might have fifty different judgments as to what would be proper to do; that good judgment, considering modern modes of travel, might require that the barrier should be farther away from the opening, but if the defendant used the best judgment he possessed and acted in good faith there could be no recovery; that unless it was conceded by the plaintiff that the defendant was using his best judgment and acting in good faith on the matter he would put that question to the jury; that if the plaintiff would say that he did not claim that the defendant did not exercise the best judgment he possessed, or that he did not act honestly, then the motion would be

[illegible]

The first question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The evidence is sufficient to establish that the defendant is guilty of the crime charged.



sustained; that he wanted the record to clearly show whether any such claim was made by the plaintiff; whereupon it was admitted by the plaintiff that the defendant would testify that he used his best judgment, and that the plaintiff had no evidence to rebut that position except what was already in. Following this statement the court directed the verdict.

We will assume appellant's first position that appellee, as road commissioner, was, notwithstanding the Tice law, charged with a duty to look after this road in this emergency without discussing or deciding that question, and proceed to the inquiry whether the court erred in directing a verdict for the defendant on the ground that there was no actionable negligence shown. This court, speaking through Justice Cartwright in *Nagle v. Wakey*, 59 Ill. App. 198, said- " Whether an action will lie against commissioners of

highways for damages resulting to an individual from the manner in which they have discharged their official duty to the public on the ground that it was not discharged with reasonable prudence and skill, has not been settled in this state by any decision of the supreme court."

That question was then discussed with reference to many authorities. *Tearney v. Smith*, 86 Ill. 391 ( relied on here by appellant ) was distinguished and said not to be an authority "that an individual may sue where the only right is in the general public", and the conclusion was reached that highway commissioners are only required to exercise their judgment and discretion in repairing and improving the roads and bridges of the towns,"and when the public have had a fair and honest exercise of that judgment and discretion they have got all that we think they are entitled to. It would be against reason to elect commissioners to use their best judgment and then sue them for doing it." On appeal that opinion was adopted by the supreme court. (161 Ill. 387) There was a dissenting opinion



and it appears that there is some conflict of authority in the American States on the question there decided, but it left the law settled in this state. This court held in *Neville v Viner*, 115 Ill. App. 364, that highway commissioners are not liable in an action for injuries resulting to an individual from the manner in which they have discharged their official duties to the public, even if there is proof from which the jury might find that such duties were not discharged with reasonable prudence and skill, and said the very strong dissent in *Nagle v Wakey*, 161 Ill. 387, only emphasizes the distinctness with which the court there laid down that doctrine. The same principle is announced in *Pearl v. King*, 179 Ill. App. 562. The court there said;- " If in a suit brought

against them for damages occasioned by wilful failure on their part to perform their duties highway commissioners must sustain their judgment as to the best means of repairing a road by the weight of the evidence, few, if any, men possessed of any property would be willing to imperil it by voluntarily accepting the office of commissioner with its attendant hazards. "

Appellant cites authority and assumes positions that might call for much consideration and discussion in the absence of the Illinois cases above cited. Those cases are controlling here, and practically every suggestion made by appellant is found there discussed and decided. It would serve no good purpose to extend this opinion by a repetition of what can there be read.

We conclude that even on appellant's assumption that appellee was, as commissioner, charged with a duty to act in the emergency, still the evidence did not show or tend to show any actionable negligence in so doing; therefore the judgment is affirmed.

Affirmed.

and it appears that there is no conflict of law only in the  
American states on the question there raised, but it is settled in this state. This court held in *Leville v. Viner*, 111 Ill. App. 364, that highway commissioners are not liable in an action for injuries resulting to an individual from the manner in which they have discharged their official duties to the public, even if there is error from which the injury might flow, such duties were not discharged with reasonable prudence and skill, and aid the very strong dissent in *Key v. Key*, 161 Ill. 387, only emphasizes the distinction with which the court there laid down the doctrine. The same principle is announced in *Leville v. Viner*, 119 Ill. App. 567. The court there said: "If in a suit brought against them for damages occasioned by official failure on their part to perform their duties as highway commissioners, plaintiffs must establish their right to the best means of repairing a road by the weight of the evidence, and, if they are possessed of that property, they will be liable to liability if they voluntarily acquiesce in the failure of a road over which they have no control."

Appellant offers no other evidence to show that the Illinois courts were cited. Those cases are *Leville v. Viner*, and practically every case cited by appellant is found there unchanged and unaltered. It would serve no good purpose to extend the opinion by a repetition of what has already been said.

It is concluded that even on appellant's assumption that the law, as announced, is correct with a duty to act in the emergency, still the evidence is not such as to show an action for negligence in so doing; therefore the judgment is affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*





6235

2569

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 108

V

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Fred Rose, by his next friend,  
Defendant in Error,  
-vs- Error to Lake.  
Helen Morton,  
Plaintiff in Error.

DIBELL, J.

Fred Rose, a minor, by his next friend, sued Helen Morton in an action on the case, and on the trial had a verdict for \$2000, and plaintiff, in obedience to the suggestion of the court, remitted \$1,000 and had a judgment for \$1,000, and defendant brings the record to this court for review.

The only part of the declaration which went to the jury was the first count. It alleged that defendant at the time of the accident in question possessed a wild, vicious and spirited horse, which disposition she well knew; that she directed said plaintiff to mount and drive said horse; that plaintiff had no knowledge of the vicious, wild and unruly disposition and habits of said horse, and that defendant negligently failed to warn and instruct him concerning the same; that plaintiff, with due care for his own safety, mounted and backed said horse in obedience to the direction of the defendant, and while endeavoring to back the horse, as instructed by defendant, through the negligence of defendant, said horse on account of his wild, vicious and untrained condition, reared and plunged about so that plaintiff was thrown and his left leg was broken, and he was wounded and suffered great pain, and was permanently injured, and was deprived of the gains and profits which he might have made, etc.

Fred Rose, by his next friend,  
Helen Norton, in answer,

-7-

Plaintiff in reply.

Helen Norton,

LIBELL, J.

Fred Rose, a minor, by his next friend, Helen Norton  
in an action on the case, and on the writ of a writ of  
\$2000, and plaintiff, is indebted to the defendant of the  
court, resulting in a judgment for \$1,000, and the  
defendant brings the record to this court for review.

The only part of the declaration which went to the jury  
was the first count. It alleged that whereas at the time of  
the accident in question defendant possessed a wild, vicious and untamed  
horse, which disposition she well knew; and that plaintiff had no  
plaintiff to want and take care of; and that plaintiff had no  
knowledge of the vicious, wild and untamed disposition and habits  
of said horse, and that defendant negligently failed to warn him  
of said horse, and that defendant negligently failed to warn him  
instantly the concerning the case; and that plaintiff, and the case  
for his own safety, wanted and took care of said horse in defendant  
to the detriment of the defendant, and that plaintiff, and the case  
the horse, as instructed by defendant, through the negligence  
of defendant, said horse on account of his wild, vicious and  
untamed condition, having been charged upon to plaintiff  
was thrown and his left leg was broken, and he was wounded and  
suffered great pain, and was permanently injured, and that he  
prived of the pain and profits which he might have made, and



Defendant pleaded not guilty. The jury not only found the issues for the plaintiff but also in answer to requests by defendant for a special verdict found specially that the horse in question was vicious, wild and of an unruly disposition and habits; that the defendant knew these facts, and that she ordered plaintiff to ride and drive said horse,

The proof shows that the animal was a blooded mare named Rosadora; that she had a very tender mouth; that she was accustomed to rear up on her hind legs whenever the bits were pulled; that defendant had ridden her when she so reared up and had been present at other times when she so reared up; that on August 30, 1911, defendant was riding said horse on a course at the Onwentsia Club at Lake Forest; that she was training the mare for some purpose connected with an exhibition or display that was soon to be had there; that she tried to back the mare and could not; that other people before that had failed in efforts to back her; that plaintiff was standing near by, and plaintiff and defendant were not acquainted with each other; that plaintiff was less than sixteen and one half years old and had never noticed this mare before; that defendant called plaintiff to the mare and told him to back her and he took hold of the reins at the bits and tried to back her and failed; that defendant then got off the mare and told plaintiff to get on and back her; that the mare had on a double bitted bridle with a safety bit and a curb bit and a line to each, and that it was known to those who handled the mare that if the curb bit was pulled she would rear up; that plaintiff was not acquainted with that kind of a bit and knew nothing about

Defendant pleads not guilty. The jury has only found the issues for the trial but also in answer to requests by defendant for a special verdict found specially that the horse in question was vicious, wild and of an unruly disposition and habits; that the defendant knew these facts, and that she ordered plaintiff to ride and drive said horse.

The proof shows that the animal was a blooded mare named Rosadora; that she had a very temperamental disposition; that she was accustomed to rear up on her hind legs whenever she was frightened; that defendant said ridden her when she so pleased up and down present at other times when she so pleased up; in 1911, defendant was riding said horse on a course at the Owensville Club at Lake County; that she was claiming the horse for some purpose connected with an exhibition of riding that was soon to be held there; that she tried to make the horse stop and not; that other people before her and behind her in the line were her; that plaintiff was at the same time, on the horse and defendant were not acquainted with each other; that plaintiff was less than eighteen months old, gray and had never ridden this mare before; that defendant called plaintiff to the mare and told him to back her; that she was at the same time and tried to back her and failed; that defendant then got off the mare and told plaintiff to get on and back her; that she was on a double bridle with a snaffle bit and a curb bit and a line to each, and that it was known to those who handled the mare that if the curb bit was pulled she would rear up; that plaintiff was not acquainted with this mare at the time she was riding her.

the disposition of the animal; that he got upon the mare pursuant to defendant's direction and tried to back her by pulling upon the bits and the mare reared up and fell over backwards and broke plaintiff's leg. It would serve no useful purpose to indicate the different witnesses by whom this proof was made. It is substantially uncontradicted. We are of opinion that it makes a case for plaintiff. Defendant now claims that the declaration should have alleged that the animal was accustomed to rear up. No claim of variance was made during the trial, and we hold the declaration good after verdict. It is argued that there is no proof of scienter, but we find that proof in the record, as above stated. We think it evident that it was negligence for defendant to direct this boy to mount this spirited animal for the purpose of doing what she was unable to do. It is said the damages are excessive. Plaintiff was in a hospital for some eight weeks, wearing splints. Thereafter he wore a plaster cast for two or three weeks while he was in bed at home. He walked on crutches for a time. The surgeon who attended him testified that both bones of the left leg were broken and that there was a good recovery, but that there was a little restriction in freedom of motion of the knee, common to all fractures and due to the length of time the leg remained in a cast. At the time of the trial, more than two and one-half years after the accident, plaintiff testified that he occasionally suffered pain at the place of the fracture, which was between the knee and the ankle. We are of opinion that the judgment is not excessive.

Defendant introduced an affidavit, sworn to by plaintiff before one Arthur J. Dixon, giving his version of how the accident



the disposition of the animal; that he was upon the same ground  
to defendant's direction as to the place to which he was to go  
the bite and the name of the dog and the name of the owner and the  
plaintiff's dog. It would serve no useful purpose to require  
the different witnesses to prove this ground. It is un-  
necessarily complicated. An act of omission that is a  
case for plaintiff. Defendant may object to the declaration  
should have alleged that the animal was dangerous to man.  
No claim of variance was made during the trial, and we hold the  
declaration good under the facts. It is agreed that there is no  
proof of scienter, but we find that proof in the facts, as above  
stated. We think it evident that it was negligence for defendant  
to direct this boy to mount this spirited animal for any purpose  
of doing what was manifestly dangerous to do. It is said the damage was  
excessive. Plaintiff was in a hospital for some time, and  
was unable to work. Therefore he was a greater loss for two or  
three weeks while he was in bed at home. He was an experienced  
for a time. The witness who attended his testimony that some  
bones of the left leg were broken and that there was a good re-  
covery, but that there was a little restriction in motion of  
motion of the knee, down to all testimony and up to the death  
of the leg remained in a cast. At the time of the trial,  
more than two and one-half years after the accident, plaintiff  
testified that he occasionally suffered pain at the knee and the  
fracture, which was between the knee and the ankle. We are of  
opinion that the judgment is not excessive.

Defendant introduced an affidavit, sworn to by plaintiff  
before one Arthur J. Wilson, stating his version of how the accident

happened. In rebuttal plaintiff called Dixon and ascertained that he was in the employ of Frank J. Cantor, and that Cantor was an attorney for the London Guarantee and Accident Company, and inquired if he took that affidavit as the representative of the company, and he said he did not; that Mr. Cantor paid him and that he thought that Mr. Cantor represented Mr. Morton, the father of defendant, but that he did not know. All this was elicited without any objection by defendant. Dixon was then asked if in fact the money paid him by Cantor was not paid by said accident company. An objection by defendant to that question was sustained. Defendant contends that this was an effort to induce the jury to believe that defendant was protected by insurance, and that this was improper evidence for which the case should be reversed. It has been held many times by the supreme and appellate courts of this state that such evidence is not admissible and that it is reversible error to develop the fact that an insurance company is responsible and not the defendant. We think this objection should not prevail here for the reason that the record shows that the accident company had nothing to do with this claim or suit, and that the matter supposed to be erroneous was not objected to by defendant, and that, if any harm was done, it was cured by the remittitur of one-half of the verdict.

The judgment is therefore affirmed.



happened. In rebuttal plaintiff called Dixon and ascertained that he was in the employ of Frank J. Cantor, and that Cantor was an attorney for the London Guarantee and Accident Company, and inquired if he took that affidavit as the representative of the company, and he said he did not; that Mr. Cantor paid him and that he thought that Mr. Cantor represented Mr. Barton, the father of defendant, but that he did not know. All this was all cited without any objection by defendant. Dixon was then asked if in fact the money paid him by Cantor was not paid by said accident company. An objection by defendant to that question was sustained. Defendant contended that this was an effort to induce the jury to believe that defendant was protected by insurance, and that this was improper evidence for which the case should be reversed. It has been held many times by the supreme and appellate courts of this state that such evidence is not admissible and that it is reversible error to develop the fact that an insurance company is responsible and not the defendant. We think this objection should not prevail here for the reason that the proof shows that the accident company had nothing to do with this claim or suit, and that the matter supposed to be erroneous was not objected to by defendant and that, if any harm was done, it was cured by the remittitur and one-half of the verdict. The judgment is therefore affirmed.

STATE OF ILLINOIS, {  
SECOND DISTRICT.    } ss.    I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court.*



6332  
(2573)  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 124

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BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 6332.

The People of the State of Illinois

Defendant in error.

vs

Error to Co. Ct. Lake.

Otto Wallin, Plaintiff in error.

Dibell, J.

Otto Wallin brings before us for review a judgment of the court below upon a conviction by a jury under fifteen counts of an information charging him with a violation of the act concerning anti-saloon territory. He was fined an aggregate of \$1,150. and sentenced to imprisonment for thirty days in the county jail. The main contentions of defendant are disposed of adversely to him in People v McCanney, Gen. No. 6331, in which we file an opinion this day.

To find in the proof fourteen sales of intoxicating liquor, it is necessary to count eight drinks of buck, which the detectives testified was a malt liquor. The last sales proved were on June 6. The chemist for the State was not furnished with buck to analyze in this case, but only cider. Defendant testified not only that the buck he sold was not a malt liquor but also that he had no buck at that place till June 10, when he first bought it. He proved by the person from whom he bought it that he first sold buck to defendant on June 10. We conclude the jury were not warranted in finding that it was proved by the evidence beyond a reasonable doubt that the detectives drank buck in that place. As there was not proof of enough sales of cider with alco in it to support a conviction under more than half the counts, the judgment must be reversed. The People seek to sustain the conviction under all the counts by the testimony of the defendant as to what he sold, but his

The People of the State of Illinois

Defendant in error.

Error to Ct. Ct. Linn.

vs

Otto Wallin, Plaintiff in error.

Dibell, J.

Otto Wallin brings before us for review a judgment of the court below upon a conviction by a jury under Illinois counts of an information charging him with a violation of the act concerning anti-salo-territory. He was fined an aggregate of \$1,150. and sentenced to imprisonment for thirty days in the county jail. The main contentions of defendant are disposed of adversely to him in People v McGurney, Gen. No. 8331, in which we file an opinion this day.

To find in the record fourteen sales of intoxicating liquor, it is necessary to count eight drinks of such, which the testifies testified was a half liquor. The last sales proved were on June 8. The omission for the State was not furnished with such to analyze in this case, but only other. Defendant testified not only that the pack he sold was not a half liquor but also that he had no such at that place till June 10, when he first bought it. He proved by the person from whom he bought it that he first sold such to defendant on June 10. We conclude the jury were not warranted in finding that it was proved by the witnesses beyond a reasonable doubt that the testifies drank such at that place. As there was not proof of enough sales of other with also in it to support a conviction under more than half and counts, the judgment must be reversed. The People seek to maintain the conviction under all the counts by the testimony of the defendant as to what he sold, but his

language on that subject covered all the time down to the trial of the case, which was more than a month later. We cannot therefore assume that his testimony would support an information filed on June 19. It seems to be assumed by counsel that we can affirm the judgment under certain counts and reverse it under other counts, reliance being had on *Grom v People*, 135 Ill. App. 453. We did so hold in that case and also in *Gaul v People* 136 Ill. App. 445, but our judgment in the latter case was reversed in *People v Gaul*, 233 Ill. 630, and it was there held that in such a case we must either reverse or affirm the entire judgment.

The judgment is therefore reversed and the cause remanded.

language on that subject covered all the time down to the trial  
of the case, which was held a month later. He was not there-  
fore aware that his testimony would support an information  
filed on June 12. It seems to be assumed by counsel that we  
can affirm the judgment under certain counts and reverse it  
under other counts, reliance being had on *Green v People*, 135  
Ill. App. 454. We did not hold in that case and also in *Gault*  
*v People* 135 Ill. App. 445, but our judgment in the latter case  
was reversed in *People v Gault*, 333 Ill. 230, and it is there  
held that in such a case we must either reverse or affirm the  
entire judgment.

The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*





6341

2574

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 126

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures  
following, to-wit:



Federal Rubber Manufacturing  
Company,

Appellant,

-vs-  
Plow City Garage,

Appeal from county court  
of Rock Island.

Appellee.

DIBELL, J.

Appellant sued appellee upon a bill for automobile tires and tubes, on which \$100 had been paid, leaving a balance of \$253.31 unpaid. Defendant filed the general issue and a plea of recoupment, which set up a certain warranty of the goods and that the goods were not as warranted and that appellee's loss by reason of the breach of warranty was equal to the amount remaining unpaid. After a demurrer to the plea was sustained, it was stipulated that this defence might be admitted under the general issue. A jury was waived, the cause was tried, and appellant had a judgment for \$168.99, which, disregarding any question of interest, was a reduction of \$84.32 for the breach of warranty. Plaintiff below appeals and claims the judgment should have been for the full amount of his bill, and appellee assigns cross errors and claims its damages should have been assessed at the full amount remaining unpaid.

Appellee proved an express oral warranty made by the agent who took the order for the goods, and proved that the goods were not as warranted. Appellant insists that the written order for the goods was the contract between the parties, and that, as that order contained no warranty, there was only the warranty

Federal Rubber Manufacturing Company,

Appellant,

Appellee, vs. Appeal from Circuit Court of the District of Columbia.

Flow City Garage, Appellee.

WITNESSES, J.

Appellant sued appellee upon a bill for articles of  
 and tubes, on which \$100 had been paid, leaving a balance of  
 \$253.31 unpaid. Defendant filed the general issue and a plea  
 of recoupment, which set up a certain variety of new goods and  
 that the goods were not so warranted and that appellee's remedy  
 reason of the breach of warranty was equal to the amount remaining  
 unpaid. After a demurrer to the plea was sustained, it was dis-  
 missed. After this defence might be admitted under the general  
 issue. A jury was tried, the issue was tried, and appellee had  
 a judgment for \$103.79, which, after taking the deduction of the  
 first, was a reduction of \$4.03 for the bill of warranty.  
 Plaintiff below appeals and claims the judgment should have been  
 for the full amount of his bill, and appellee claims cross award  
 and claims its damages should have been as great as the bill amount  
 remaining unpaid.

Appellee proved an order and warranty upon the goods  
 who took the order for the goods, and proved to the jury that  
 not as warranted. Appellant insists that the order was not  
 the goods was the contract between the parties, and that, as  
 that order contained no warranty, there was only the warranty



which the law implies, and that the previous verbal warranty was cut off by the written order; and also that it is not sufficiently proved that the agent had power to make such a warranty. The general rule is that in making such a sale, the agent is authorized to do whatever is usual in carrying out the object of his agency, and that, if it is usual to give a warranty, the agent may give such a warranty in order to effect a sale, and that what is usual is a question of fact. 2 Benjamin on Sales, 6th Am. Ed. Sec. 945; Woodford v McClenahan, 4 Gilm. 85; 31 Cyc 1354. In order to raise the question whether this written order avoided the previous verbal warranty it was necessary that the order should be in evidence. Appellant called as a witness the president and manager of appellee and proved by him his signature to the order and then offered the order. It appears that there were many endorsements and alterations upon it and for that reason the offer was objected to. The court held that it would be admitted as to such matters as were on the order with the approval of the president of appellee who signed it, and that it would not be admitted as to the other matters on the order. Appellant did not then show what matters had been placed there by the president's approval and what had since been added, but instead the parties stipulated that all the goods set out in the copy of account sued on were ordered and received and that the prices were correct. It therefore seems that the order was not in fact in evidence and there is nothing on which to base the claim that the verbal warranty was avoided by the subsequent written order. But, further, the rule that a written contract of sale avoids a prior verbal warranty has no application where the writing is only an order for the goods. 35 Cyc. 380. Therefore appellant's contentions against the verbal

which the law requires, and that the previous verbal warranty  
 was cut off by the written order; and also that it is not suf-  
 ficiently proved that the agent had power to make such a warranty.  
 The general rule is that in making such a sale, the agent is  
 authorized to do whatever is usual in carrying out the object of  
 his agency, and that, if it is usual to give a warranty, the agent  
 may give such a warranty in order to effect a sale, and that what  
 is usual is a question of fact. 2 Kenton on Sales, 6th Ed. 22.  
 See 945; Woodford v McGleason, 4 Olin. 80; 31 Cyc 133. In  
 order to raise the question whether this written order voided the  
 previous verbal warranty it was necessary that the order should be  
 in evidence. Plaintiff called as a witness the president and  
 manager of appellee and proved by him his signature to the order  
 and then offered the order. It is certain that there were many  
 endorsements and alterations upon it and for that reason the offer  
 was objected to. The court held that it would be admitted as to  
 such matters as were on the order with the approval of the president  
 of appellee who signed it, and that it would be admitted as to  
 the other matters on the order. Plaintiff did not then show  
 that matters had been placed there by the president's approval  
 and that had since been altered, but introduced the order without  
 that all the goods set out in the copy of the order and goods were  
 ordered and received and that the order was correct. It there-  
 fore seems that the order was not in evidence and hence is  
 nothing on which to base the claim that the verbal warranty was  
 avoided by the subsequent written order. But, assuming, for the sake  
 of argument, that a written contract of sale makes a prior verbal warranty void,  
 no application where the written order is only an order for the goods.  
 35 Cyc. 380. Therefore plaintiff's contention that the verbal

warranty have no foundation. There was no proof to dispute the warranty nor its breach.

We are asked by appellant to decide that no damages should have been allowed to appellee in recoupment, but the proofs clearly established that damages should have been allowed. We are asked by appellee to hold that the damages should have been allowed to the full amount unpaid on the bill. We cannot reverse this case on either of these grounds for the reason that the evidence is not all before us. Five of the tires were brought into court and offered in evidence and received without objection; and the bill of exceptions ~~specifically~~ specially recites that the court made an examination of the tires. Those tires have not been certified to this court. No photographs of them were taken and inserted in the record, so that we could see, at least in part, what the court saw. No witness described the condition of those five tires. The conclusion of the trial court may have turned upon what he saw of the condition of those tires. Appellee relies upon the absence of these tires from this court to prevent a reversal on the ground that too large a sum was allowed ~~for~~ as damages. But they have an equal effect to prevent our reversing on the ground that larger damages should have been allowed. Appellee retains the property sold to it, and in this state of the record we must assume that the decision of the trial court on the facts was correct.

Many propositions of law were offered by the parties. Some were given and some were refused for each. Each side concedes that the court erred in its rulings against that party on these propositions. Probably they are not wholly consistent or correct, but, as it appears to us that substantial justice has been done upon the facts, we are of opinion we ought not to reverse on either



warrantly have no foundation. There was no proof to establish the  
warrantly nor its truth.

We are asked by applicant to decide that no damages should  
have been allowed to appellee in respect, and the proof is  
established that damages should have been allowed. We are asked  
by appellee to hold that the damages should have been allowed to the  
full amount claimed on the bill. We cannot reverse this case on  
either of these grounds for the reason that the evidence is for all  
before us. Five of the times were brought into court and admitted  
in evidence and received without objection; and the bill of ex-  
ceptions specifically recites that the same were so  
examination of the times. Those times have not been admitted  
to this court. No photographs of them were taken and admitted  
in the record, so that we could see, at least in part, what the  
court saw. No witness described the condition of these five times.  
The conclusion of the trial court may have turned upon what he saw  
of the condition of these times. Appellate review upon the question  
of these times from that court is precluded by reversal on the ground  
that too large a part was allowed xxx as damages. But we have no  
equal effect to prevent the reversal on the ground that too large  
damages should have been allowed. Applied to the bill of exceptions  
sold to it, and in this it is of the record we must assume that  
the decision of the trial court on the facts was correct.  
Many propositions of law were offered by the parties, some  
were given and some were refused for cause. Some of the propositions  
that the court acted in its rulings and that they are correct  
propositions. Probably they are not finally settling as to the  
but, as it appears to us that substantial justice was done upon  
the facts, we are of opinion we ought not to interfere on either

errors or cross-errors assigned on the propositions of law. Under the circumstances we think it would serve no useful purpose to discuss them.

The judgment is therefore affirmed.



errors or cross-errors assigned on the proposition of 1st. Under the circumstances we think it would serve no useful purpose to

discuss them.

The judgment is therefore affirmed.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



6341  
2576  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,  
in the year of our Lord one thousand nine hundred and fifteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 139

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day  
of September, A. D. 1915, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:

THIRD STAFF, HT 30 UNIT & Co

10-11-1944



Gen. No. 6347

Ira J. St. Onge, et al  
appellees.

vs Appeal from Rock Island.

Springfield Fire and Marine  
Insurance Company.  
appellant.

Dibell, J.

This suit is by the same plaintiffs as St. Onge et al vs Hartford Fire Insurance Company, Gen. No. 6346, in which we file an opinion this day, and concerns the same stock of merchandise and the same fire loss as that case, and has the same attorneys on both sides in this court, and was tried shortly after the Hartford case and on substantially the same evidence, and most of the questions here arising are the same that we discussed in the opinion in that case, and we refer to that opinion for a disposition of most of the questions here involved. This suit resulted in a verdict and judgment for plaintiffs for \$2,266.66, the verdict specifying that the interest was \$266.66. The policy here sued upon is the one described in the opinion in the Hartford case as the Springfield policy. Defendant below appeals.

The policy sued on, ~~is xxxxxx~~ in describing the property insured, contained the following: "\$2000 on stock of merchandise, consisting principally of dry goods, groceries and shoes, and other merchandise not more hazardous, such as is usually kept for sale in a small town general store." Then followed a second item on fixtures, not filled out. Then was described the location of the building. Then was the following: "Total concurrent insurance permitted as follows: On first ~~in~~ item above named, \$\_\_\_\_\_. On second item, \$\_\_\_\_\_."

Ita J. St. Onge, et al

appellees.

Appeal from Rock Island.

vs

St. Springfield Fire and Marine

Insurance Company.

appellant.

Dibell, J.

This suit is by the same plaintiffs as St. Onge et al  
vs Hartford Fire Insurance Company, Gen. No. 6346, in which  
we file an opinion this day, and concerns the same stock of  
merchandise and the same fire loss as that case, and has the  
same attorneys on both sides in this court, and was tried shortly  
after the Hartford case and on substantially the same evidence,  
and most of the questions here arising are the same that we  
discussed in the opinion in that case, and we refer to that  
opinion for a disposition of most of the questions here involved.  
This suit resulted in a verdict and judgment for plaintiffs for  
\$2,368.66, the verdict specifying that the interest was \$360.00.  
The policy here sued upon is the one described in the opinion  
in the Hartford case as the Springfield policy. Defendant below  
appeals.

The policy sued on, in describing the prop-  
erty insured, contained the following: "\$3000 on stock of  
merchandise, consisting principally of dry goods, groceries and  
shoes, and other merchandise not more particular, such as is  
usually kept for sale in a small town general store." Then  
followed a second item on fixtures, not filled out. Then was  
described the location of the building. Then was the following:  
"Total concurrent insurance deposited as follows: On first in  
item above named, \$1000. On second item, \$2000."

The policy also contained the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The declaration alleged that this last clause was left in the policy by mistake and inadvertance of the agent who wrote the policy, and that at the time said policy was issued appellant knew that appellees had and intended to keep till its expiration the Hartford policy, (describing it,) and that appellees desired to have and continue in force other insurance policies of other companies covering said property, and that on February 3, 1913 and on February 27, 1913, appellees, with the full knowledge and acquiescence and consent of appellant, took out and procured a policy of insurance in the Assured's National Mutual Fire Insurance Company for the sum of \$2000. and in the Hartford Insurance Company in the sum of \$2000 which were, with the policy here sued on, in full force and effect at the time of the loss by fire in question, and that when appellant's policy was executed it was not the intention and agreement of the parties that appellees should not have the right to carry other insurance on said property, but it was the intention understanding and agreement between the parties that they should have such right, and that appellant, by its knowledge, acquiescence and agreement, waived said conditions, and consented to other insurance; and that appellees, up to the time of the fire, had not read and did not know that said condition against other insurance was in said policy, but relied on the intent and agreement that they might have other insurance on said property, and on appellants knowledge thereof; that appellant's agent had written said Hartford policy, and had in his custody said policies, and appellees understood and believed that appellant's



The policy also contained the following: "This entire policy, unless otherwise provided by agreement in interest between or with hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The declaration alleged that this last clause was left in the policy by mistake and inadvertence of the agent who wrote the policy, and that at the time said policy was issued a defendant knew that appellees had and intended to keep till its expiration the Hartford policy, (issuing it), and that appellees desired to have and continue in force other insurance policies of other companies covering said property, and that on February 3, 1913, and on February 27, 1913, appellees, with the full knowledge and acquiescence and consent of appellant, took out and procured a policy of insurance in the Assurance National Mutual Fire Insurance Company for the sum of \$2000, and in the Hartford Insurance Company in the sum of \$2000 which were, with the policy here sued on, in full force and effect at the time of the loss by fire in question, and that when appellant's policy was executed it was not the intention and agreement of the parties that appellees should not have the right to carry other insurance on said property, but it was the intention and understanding and agreement between the parties that they should have such right, and that appellant, by its knowledge, acquiescence and agreement, waived said conditions, and consented to other insurances; and that appellees, up to the time of the fire, had not read and did not know that said condition existed other than insurance was in said policy, but relied on the intent and agreement that they might have other insurance on said property, and on appellees' knowledge thereof; that appellant's agent had written said Hartford policy, and said in his custody said policy, and appellees understood and believed that appellant's

policy permitted other insurance. The policy here sued on was dated December 23, 1912, and ran from that date to December 23, 1913. At that time a Hartford policy was on the property and in the possession of appellant's agent at his bank and in his office, and subsequently it was renewed by the policy sued on in the other case, dated and in force February 27, 1913, for one year. The fire was in the night of Sunday, April 13, 1913. St. Onge had no perfectly safe place in which to keep his policies and his Hartford policy then in force was in the vaults of R. P. Wait, the agent of appellant, and this policy was issued by directions by telephone, and was placed in said vault and was never seen by appellees till after the fire. As appellant's agent issued this policy with knowledge that another policy upon the same property was already in force, and did not refuse to issue this policy, or notify assured that the policy we was issuing would immediately be void because the other insurance was outstanding, we think it clear that appellant's agent understood and meant, by delivering this policy with the provisions above quoted, to permit additional concurrent insurance, without placing a limit upon the amount thereof. Any other construction of the policy would make it a fraud upon the insured to have issued it, and the fraud of appellant's agent in issuing it would also be the fraud of appellant. Afterwards the policy referred to in our opinion in the Hartford case as the Assured policy was issued by another agent, and appellant here claims that the issuing of that policy invalidated the policy here sued upon. We are of opinion that it did not, both because we interpret the policy here sued on to permit additional concurrent insurance without limitation, and also because St. Onge testified that he called up Pearl Wait, the sister of the agent, and the person who actually



policy permitted other insurance. The policy here sued on was dated December 23, 1913, and ran from that date to December 23, 1915. At first time a Hartford policy was on the property and in the possession of a plaintiff's agent at his bank and in his office, and subsequently it was renewed by the policy and on in the other case, dated and in force February 27, 1913, for one year. The fire was in the night of Sunday, April 13, 1913. St. Onge had no perfectly safe place in which to keep his policies and his Hartford policy then in force was in the vault of R. P. Wait, the agent of appellant, and this policy was issued by directions by telephone, and was placed in said vault and was never seen by appellees till after the fire. As appellant's agent issued this policy with knowledge that another policy upon the same property was already in force, and did not refuse to issue this policy, or notify assured that the policy was as issuing would immediately be void because the other insurance was outstanding, we think it clear that appellant's agent understood and meant, by delivering this policy with the provisions above quoted, to permit additional concurrent insurance, without placing a limit upon the amount thereof. Any other construction of the policy would make it a fraud upon the insured to have issued it, and the fraud of appellant's agent in issuing it would also be the fraud of appellant. Afterwards the policy referred to in our opinion in the Hartford case as the assured policy was issued by another agent, and appellant are claiming that the issuing of that policy invalidated the policy here sued upon. We are of opinion that it did not, both because we interpret the policy here sued on to permit additional concurrent insurance without limitation, and also because St. Onge testified that he called up Perry Wait, the later of the agent, and the person who actually

attended to Wait's insurance and wrote his insurance, and asked her how much insurance he had on his property, and told her then that an agent was there representing another insurance company, and that he afterwards told her that he had taken out a policy in the Assured, and would send it up to the bank to have it put in their vault; and that he also afterwards told R. P. Wait over the telephone that he had such a policy, and wished to put it in the bank's vault. It is argued by appellant that Wait and his sister each denied these conversations, and when their evidence, both in the abstract and in the additional abstract, is considered, we conclude that they did not mean to be so understood. Pearl admitted that St. Onge did say something to her about the agent of another insurance company at the time he asked how much insurance he had on his stock of goods; and the most that she and her brother stated positively was that they did not remember being told that he had a policy in the Assured. Inasmuch as St. Onge's testimony was positive and Pearl's was a partial admission, and R. P. Wait and Pearl did not positively deny such statement, but only denied recollecting having received such information, the jury might reasonably believe the positive testimony of St. Onge. We cannot see the witnesses, and we cannot know their manner on the witness stand in testifying on that subject, and it is obvious the jury did believe St. Onge and we are unable to say, in view of the qualified character of the denial of R. P. Wait and Pearl that the jury should have found the other way on this subject.

Certain things occurred at the trial concerning policies on this property once held by St. Onge, issued by the Continental Insurance Company and the Hanover Insurance Company, and it is argued that there was reversible error in the rulings of the court on this subject. Appellees in their brief say that appel-

attended to Kait's insurance and wrote his insurance, and asked her how much insurance he had on his property, and told her that that an agent was there representing another insurance company, and that he afterwards told her that he had taken out a policy in the Assured, and would send it up to the bank to have it put in their vault; and that he also afterwards told R. P. Wait over the telephone that he had such a policy, and wished to put it in the bank's vault. It is argued by appellant that Kait and his sister each denied these conversations, and when their evidence, both in the abstract and in the circumstantial abstract, is considered, we conclude that they did not mean to be so understood. Pearl admitted that St. Onge did say something to her about the agent of another insurance company at the time he asked how much insurance he had on his stock of goods; and the most that she and her brother stated positively was that they did not remember being told that he had a policy in the Assured. Inasmuch as St. Onge's testimony was positive and Pearl's was a partial admission, and R. P. Wait and Pearl did not positively deny such statement, but only denied recollection having received such information, the jury might reasonably believe the positive testimony of St. Onge. We cannot see the witnesses, and we cannot know their manner on the witness stand in testifying on that subject, and it is obvious the jury did believe St. Onge and we are unable to say, in view of the qualified character of the denial of R. P. Wait and Pearl that the jury should have found the other way on this subject. Certain things occurred at the trial concerning policies on this property once held by St. Onge, issued by the Continental Insurance Company and the Denver Insurance Company, and it is argued that there was reversible error in the ruling of the court on this subject. Appellants in their brief say that they



lant offered an amendment to its pleadings to raise these questions near the close of the trial, and that the court refused and properly so, to permit said amendment to be made. This appears to be a misapprehension of the state of the record. Appellant originally filed a plea of non-assumpsit, accompanied by a notice of special matter relied upon in defense, in four paragraphs. The record shows that the trial began on April 4, 1916, and that on that day and before the trial began appellant was granted leave of court to amend its notice filed under the plea of the general issue, and thereupon appellant filed another plea of non-assumpsit, and attached thereto a notice of special matter relied upon in defense, in two paragraphs. Whether appellant thereby abandoned such matters of special defense stated under the first plea as were not included in the second plea we do not decide. But this notice set up that when this policy was executed the insured had another policy on the same property in the Continental Insurance Company of New York, and after this policy was executed insured obtained a policy in the Hanover Fire Insurance Company. On the cross examination of St. Onge, and after he had stated that the Hartford policy was in force when the Springfield policy was issued he was asked if that was all the insurance he then had on his stock of goods, and he answered that it was. He was then asked if when the Springfield policy was issued he did not have a policy in the Continental Insurance Company of New York, dated January 1, 1912, expiring January 1, 1913, and if on January 1, 1913, the Continental policy was not renewed, and if thereafter it was not cancelled and a policy issued to him in the Hanover Insurance Company on January 7, 1913, and whether he ever ordered any insurance from Shoenmacher, a fire insurance agent, and whether Shoenmacher ever issued any policies to him

Plaintiff offered an amendment to its pleading to raise these ques-  
 tions near the close of the trial, and that the court refused  
 and properly so, to permit said amendment to be made. This  
 appears to be a misapprehension of the state of the record.  
 Appellant originally filed a plea of non-assumpsit, accompanied  
 by a notice of special matter relied upon in defense, in four  
 paragraphs. The record shows that the trial began on April 4,  
 1916, and that on that day and before the trial began a plaintiff  
 was granted leave of court to amend its notice filed under the  
 plea of the general issue, and thereupon a plaintiff filed  
 another plea of non-assumpsit, and attached thereto a notice  
 of special matter relied upon in defense, in two paragraphs.  
 Whether appellant thereby abandoned such matters of special  
 defense stated under the first plea as were not included in  
 the second plea we do not decide. But this notice set up that  
 when this policy was executed the insured had another policy  
 on the same property in the Continental Insurance Company of  
 New York, and after this policy was executed insured obtained  
 a policy in the Hanover Fire Insurance Company. On the cross  
 examination of St. Orge, and after he had stated that the Har-  
 ford policy was in force when the Springfield policy was issued  
 he was asked if that was all the insurance he then had on his  
 stock of goods, and he answered that it was. He was then asked  
 if when the Springfield policy was issued he did not have a  
 policy in the Continental Insurance Company of New York, dated  
 January 1, 1915, expiring January 1, 1917, and if on January  
 1, 1913, the Continental policy was not renewed, and if there-  
 after it was not cancelled and a policy issued to him in the  
 Hanover Insurance Company on January 7, 1913, and whether he  
 ever ordered any insurance from Schoenacher, a fire insurance  
 agent, and whether Schoenacher ever issued any policy to him



on this stock of goods during 1912 or January 1913, and objections were sustained to these questions. While appellant was putting in its proofs, it made an offer to prove that Shoenmacher, an insurance agent at Reynolds who represented the Continental and Hanover Insurance Companies and others, on January 6, 1912, issued a policy of insurance on this property which policy did not permit other insurance, and that it remained in force until it expired on January 6, 1913, and that another policy was then issued of like character, which was cancelled by the company on January 12, 1913, and that on January 25, 1913, Shoenmacher issued a policy on this property in the Hanover company which permitted certain concurrent insurance, and that said policy was cancelled on February 3, 1913. Appellee objected, and this objection was sustained. Thereafter the court ruled that this might be competent as impeaching the testimony of St. Onge, if appellant would show that either of these policies was in force when St. Onge had his conversation either with Pearl or with R. P. Wait concerning the renewal of the Hartford policy, and appellant's counsel then stated that they did not think they could establish that fact, and the objection was then sustained. It is argued that this was error. It will be perceived that it is not claimed that any of this insurance was in force when this fire occurred. We are of opinion that under the terms of the policy sued upon as above set out, and in view of the facts concerning the issue by appellant's agent of the present policy, when he knew of and had in his possession another policy on the property, and of the other facts above stated, the appellant is to be ~~examined~~ considered as having permitted additional concurrent insurance without any limit. Therefore it is immaterial what other insurance was in force when this policy was issued, and what other

on this stock of goods during 1913, and objects  
were maintained to these questions. This question  
was put in its proper place, it was an offer to prove that  
teacher, an insurance agent at Reynolds who represented the  
Continental and Fidelity Insurance Companies and others, on  
January 8, 1913, issued a policy of insurance on this property  
which policy did not permit other insurance, and that it was issued  
in force until it expired on January 8, 1913, and that another  
policy was then issued of like character, which was cancelled  
by the company on January 12, 1913, and that on January 27, 1913,  
Shoemaker issued a policy on this property in the Fidelity  
company which permitted certain concurrent insurance, and that  
said policy was cancelled on February 5, 1913. A policy ob-  
jected, and this objection was sustained. Thereafter the testimony  
ruled that this might be competent as impeaching the testimony  
of St. Onge, if a plaintiff could show that either of these  
policies was in force when St. Onge had his conversation either  
with Pearl or with R. P. With concerning the renewal of the  
Hartford policy, and appellant's counsel then stated that they  
did not think they could establish that fact, and was ob-  
jection was then sustained. It is argued that this was error.  
It will be perceived that it is not claimed that any of these  
insurance was in force when this loss occurred. It was the  
opinion that under the terms of the policy issued upon the  
above set out, and in view of the facts concerning the loss  
by appellant's agent of the recent policy, when he was  
and had in his possession another policy on the property, and  
of the other facts above stated, the plaintiff is to be considered  
considered as having established that the loss was covered by the  
without any limit. Therefore it is held that the plaintiff is  
insurance was in force when this policy was issued, and that other

insurance was thereafter issued which was cancelled before the fire. It is material what insurance was in force on this property when this loss occurred, because the more insurance there was in force the less is the proportionate liability of appellant for the amount of the loss. Inasmuch as the supposed facts concerning the issue of the Continental and the Hanover policies and their subsequent cancellation are not material, it was not error to refuse to admit that evidence, and it was not error to refuse to permit a cross examination of St. Onge on that subject, for a witness cannot be impeached upon immaterial matters.

The other contentions of appellant are disposed of in the opinion in the Hartford case. We find no reversible error in the record. The judgment is therefore affirmed.

insurance was thereafter issued which was cancelled before the fire. It is material that insurance was in force on this property when this loss occurred, because the core insurance there was in force the less in the proportionate liability of apportionment for the amount of the loss. Inasmuch as the supposed facts concerning the issue of the Continental and the Hanover policies and their subsequent cancellation are not material, it was not error to refuse to admit that evidence, and it was not error to refuse to permit a cross examination of St. Onge on that subject, for a witness cannot be impeached upon immaterial matters. The other contentions of appellant are disposed of in the opinion in the Hartford case. We find no reversible error in the record. The judgment is therefore affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*





6350

2577

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 140

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Gen. No. 6350.

Daniel L. Dougherty, appellee.

vs

Appeal from City Court Spring Valley

Spring Valley Coal Company, appellant.

Dibell, J.

On February 16, 1916, while Daniel L. Dougherty was in the employ of the Spring Valley Coal Company as a coal miner, he was injured by a fall of rock from the roof of an entry way. He brought this suit to recover damages for said injuries and had a verdict and a judgment for \$950. from which the company appeals.

The original declaration described the roof of the entry as in a dangerous condition and alleged that appellant did not use reasonable care to provide for appellee a reasonably safe place in which to work and reasonably safe condition in which to work, but negligently failed to perform that duty and thereby plaintiff was hurt. The first and second additional counts charged a wilful violation by appellant of provisions of the Mining Act, which required periodical examinations of the mine and that dangerous places be marked and recorded in a book, and to prevent men from going into the mine till the dangerous conditions were removed. The plea was not guilty. It was averred and proved that appellant had never been under the Workmen's Compensation Act, but had rejected the same.

Under the duty set out in the first count, an employer does not become an insurer that the places where he sets his men at work shall be absolutely safe. From *Hess v Rosenthal*, 160 Ill. 621, to *Donk Brothers Coal Co. v Thil*, 228 Ill. 233, there are many cases where our Supreme Court following the rule laid down in *Cooley on Torts* and *Wharton on Negligence* has held that the duty which the employer owes to the employee

Daniel L. Dougherty, appellee.

vs  
Spring Valley Coal Company, appellant.

Dibell, J.

On February 16, 1916, while Daniel L. Dougherty was in the employ of the Spring Valley Coal Company as a coal miner, he was injured by a fall of rock from the roof of an entry way. He brought this suit to recover damages for said injuries and had a verdict and a judgment for \$800. from which the company appeals.

The original declaration described the roof of the entry as in a dangerous condition and alleged that appellant did not use reasonable care to provide for appellee a reasonably safe place in which to work and reasonably safe condition in which to work, but negligently failed to perform that duty and thereby plaintiff was hurt. The first and second additional counts charged a willful violation by appellant of provisions of the Mining Act, which required periodical examinations of the mine, and that dangerous places be marked and recorded in a book, and to prevent men from going into the mine till the dangerous conditions were removed. The plea was not guilty. It was averred and proved that appellant had never been under the Workmen's Compensation Act, but had rejected the same. Under the duty set out in the first count, an employer does not become an insurer that the places where he sets his men at work shall be absolutely safe. From *Hess v Rosenthal*, 160 Ill. 621, 50 Dick 379, *People v Thill*, 224 Ill. 233, there are many cases where our Supreme Court following the rule laid down in *Cooley on Torts* and *Warren on Negligence* has held that the duty which the employer owes to the employee



in that respect is to exercise reasonable care to see that the place furnished for the servant to work in is reasonably safe. The evidence here presents two theories as to the facts which resulted in this injury to appellee. The mine was operated on the long wall system. In the mine was an entry known as the nineteenth west entry off the straight north. Off this entry three rooms had been turned, and in one of which appellee mined coal. The coal was about three and one half feet thick and a few inches of material were taken out underneath the coal and then the roof had to be taken down for such a distance above the coal that work could be done. In all roofs of entries of coal mines there is more or less settling of the overhead material that is often composed of rock, and at frequent intervals some of this roof has to be removed, either to make it high enough for men and cars to pass underneath, or to take down rock which is in danger of falling, and this is called "brushing". The main entries are brushed by "company men" who do this work when the miners are out of the mine. At the edge of the roof as one turned into appellee's room was what was called the "lip" and from the lip to the face of the coal each miner was required to brush his own room. Appellee's proof tended to show that after reaching his room on the morning of February 16, he went into the main entry and passed some little distance therein to where he kept his box and that he went there for either oil or a drink of water, and while on his way back to his room, and still in the main entry, rock from the roof fell upon him and inflicted the injury complained of. Appellant introduced evidence tending to prove that appellee was injured between the lip and the face of the coal in his room, and that he was engaged in brushing the roof, and pulled this rock down upon himself. There is an apparent preponderance of evidence

in that respect is to exercise reasonable care to see that the place furnished for the servant to work in is reasonably safe. The evidence here presents two theories as to the facts which resulted in this injury to appellee. The mine was operated on the long wall system. In the mine was an entry known as the nineteenth west entry off the straight north. Off this entry three rooms had been turned, and in one of which a belted miner coal. The coal was about three and one half feet thick and a few inches of material were taken out underneath the coal and then the roof had to be taken down or such a distance above the coal that work could be done. In all roofs of entries of coal mines there is more or less settling of the overhead material that is often composed of rock, and at frequent intervals some of this rock has to be removed, either to make it high enough for men and cars to pass underneath, or to take down rock which is in danger of falling, and this is called "prushing". The main entries are pushed by "company men" who do this work when the miners are out of the mine. At the edge of the roof as one turned into appellee's room was what was called the "lip" and from the lip to the face of the coal each miner was required to brush his own room. Appellee's proof tended to show that after reaching his room on the morning of February 18, he went into the main entry and passed some little distance therein to where he kept his box and that he went there for either oil or a drink of water, and while on his way back to his room, and still in the main entry, took from the roof fell upon him and inflicted the injury complained of. Appellant introduced evidence tending to prove that appellee was injured between the lip and the face of the coal in his room, and that he was engaged in brushing the roof, and that this rock fell upon himself. There is an apparent discrepancy of evidence

in favor of appellant's claim, and there is a preponderance of the evidence that that is the ~~man's~~ account of his injury which appellee gave at the time. If appellee was brushing his own roof and pulled this rock down upon himself, he cannot recover, both because at that place his employer did not owe him the duty set out in the declaration and also for the reasons which we stated in *Paietta v Illinois Zinc Co.* 153 Ill. App. 506. If, however, he was injured in the main entry as claimed by him, we fail to find in the evidence as abstracted any evidence which would justify the jury in finding that there was any appearance in the roof of the main entry of a dangerous condition so that the company was required to place a danger mark thereat and make an entry to that effect upon its record, or that would authorize the jury to find that the company had not used reasonable care to make that place reasonably safe for its employees. There is a substantial absence of any evidence that a dangerous condition existed there, except the fact, if it be a fact, that rock from the roof did fall. The condition of the roof of an entry is liable to constant change, and the condition which resulted in the fall of the main entry, if rock from its roof did fall upon appellee, may have been produced long after the examination made during the preceding night. We therefore conclude that the evidence does not support the verdict and that the case must be tried again.

Counsel for appellee put sneering questions to appellant's witnesses on cross examination. They made sneering remarks concerning one of counsel for appellant. One of them told the jury that plaintiff was poor, and invited a comparison by the jury between the financial condition of plaintiff and that of John D. Rockefeller. If the verdict had been excessive for the injuries sustained, we should have seriously considered reversing



in favor of a plaintiff's claim, and there is a responsibility of  
the evidence that that is the amount of his injury which  
appears to be at the time. If a plaintiff is unable to  
roof and pulled this roof down upon himself, he cannot recover,  
both because at that place his employer did not owe him the  
duty set out in the regulation and also for the reasons which  
we stated in *Palazzo v. Illinois State Co.*, 123 Ill. App. 206.  
If, however, he was injured in his main entry as claimed by him,  
we fail to find in the evidence as adduced any evidence which  
would justify the jury in finding that there was any a person  
in the roof of the main entry of a dangerous condition so that  
the company was required to place a danger mark there and make  
an entry to that effect upon its record, or that would authorize  
the jury to find that the company had not used reasonable care  
to make that place reasonably safe for its employees. There  
is a substantial absence of any evidence that a dangerous con-  
dition existed there, except the fact, if it be a fact, that  
rock from the roof fell. The condition of the roof of an  
entry is liable to constant change, and the condition which  
resulted in the fall of the main entry, if rock from the roof  
fell upon appellee, may have been produced long after the  
examination was taken the preceding night. We therefore  
conclude that the evidence does not support the verdict in that  
the case must be tried again.  
Counsel for appellee put answering questions to appellee's  
witnesses on cross examination. They made answering remarks un-  
derstanding one of counsel for appellee. One of them told the jury  
that plaintiff was poor, and invited a speculation by the jury  
between the financial condition of plaintiff and that of John  
D. Rockefeller. If the verdict had been excessive for the  
injuries sustained, we should have seriously considered reversing

the judgment for this misconduct of counsel. This conduct may have pleased appellee's friends in the trial court in his home town, but its tendency here is to lead the court to feel that counsel doubted their ability to procure a verdict for appellee under the evidence and the law without these improper influences.

The judgment is reversed and the cause remanded.



the judgment for the misstatement of counsel. This conduct may have pleased appellee's friends in the trial court in his home town, but the tendency here is to lead the court to feel that counsel doubted their ability to procure a verdict for appellee under the evidence and the law without these improper

influences.

The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



6353

2578

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 142

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





John Seymour,  
Appellant,  
-vs-

Appeal from DeKalb.

Woodstock and Sycamore  
Traction Company, et al.,  
Appellees.

DIBELL, J.

On October 16, 1913, John Seymour filed a bill in equity against the Woodstock and Sycamore Traction Company ( hereinafte called the Woodstock company) the Chicago, Waukegan and Fox Lake Traction Company ( hereinafter called the Waukegan company) the Interurban Construction Co pany of Chicago ( hereinafter called the Interurban company ) the Northeastern Electric Railway Company, (hereinafter called the Northeastern company) and the Central Trust Company of Illinois, to obtain a lien upon the property of the Woodstock company and the Waukegan company for certain labor and material furnished for the building of a line of interurban railway for the Woodstock company. There was service upon each defendant. The Central Trust Company answered, denying all knowledge of the allegations of the bill except as informed thereby, and calling for strict proof, and asserting that it had a prior lien upon the property as trustee under a certain deed of trust securing certain outstanding bonds of the Woodstock company. The Waukegan and the Woodstock companies filed a joint answer, in which they denied knowledge except by the bill of complaint as to the allegations of the bill, except as to its allegations concerning the Waukegan company, and denied that Seymour was entitled to a lien, or to any relief against the said two defendants. The record before us is

John Raymond,  
 Defendant,  
 -vs-  
 Woodstock and  
 Traction Company, et al.  
 Appellees.

Special Verdict.

1. That

On October 16, 1913, John Raymond filed a bill in equity against the Woodstock and Traction Company (hereinafter called the Woodstock company) the Chicago, Waukegan and Fox Lake Traction Company (hereinafter called the Waukegan company) the Interurban Traction Company of Chicago (hereinafter called the Interurban company) the Northwestern Electric Railway Company (hereinafter called the Northwestern company) and the Central Trust Company of Illinois, to obtain a lien upon the property of the Woodstock company and the Waukegan company for certain labor and material furnished for the building of a line of interurban railway for the Woodstock company. There was service upon each defendant. The Central Trust Company answered, denying all knowledge of the allegations of the bill except as informed thereby, and a bill for strict proof, and asserting that it had a lien upon the property of the trustee named in the bill asserting certain outstanding bonds of the Woodstock company. The Waukegan and the Woodstock companies filed a joint answer, in which they denied knowledge except by the bill of complaint as to the allegations of the bill, except as to its allegations concerning the Waukegan company, and denied that Raymond was entitled to a lien, or to any relief against the said two defendants. The record before me is

certified to be a complete record of the answers and of the ~~others~~ of court, and it contains no answer by the other defendants, not any default against them. It contains a reference to the master to state an account, with his conclusions of law and fact, but nothing to show that anything was ever done under that reference, The statement in appellant's brief on that subject being entirely outside of the record. On March 28, 1916, complainant filed an amendment to his bill of complaint, to which a demurrer was sustained. Thereafter he filed an amendment to said amendment by which he struck out certain language of the amendment and added certain language thereto. A demurrer was sustained to the bill as then amended. Complainant elected to stand by the bill of complaint as amended, and the bill was dismissed as to all of the defendants for want of equity, but without prejudice to the right of the complainant to proceed either at law or in equity otherwise than by a suit to enforce a lien, the final decree stating that the demurrer to the bill as amended was sustained for the reason that said bill did not state facts sufficient to entitle complainant to a mechanic's or materialman's lien. This is an appeal by Seymour therefrom.

The suit is under the act concerning liens upon railroads, Hurd's R.S. of 1916, 1654, 1655. That act requires suit to be commenced within six months after the contract is completed and requires subcontractors to serve a certain notice in writing within a certain time. The bill alleged that the work was completed June 1, 1913, so that the suit was begun in time if complainant was an original contractor. There was no allegation of any notice served, so that the bill did not state a case entitling complainant to a lien if he was a subcontractor. If the amendment filed in

The suit is under law at some time from March 1918, Lord's R.S. of 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594



1916 stated a new cause of action it was barred, because the suit as to it was not begun within six months, and because no notice was given of a subcontractor's lien. It is therefore necessary to inquire into the allegations of the original bill, and to compare them with the allegations of the amendment.

The bill alleged that Seymour was in the business of a railroad contractor, and that on August 18, 1908, as such contractor, he entered into a written contract with the Northeastern company which he alleged was a corporation duly organized under the laws of the state of Illinois, by which he agreed to furnish certain material and to ~~u~~ertain work, and clear the right of way of a certain railroad from Sycamore to connect with the Elgin and Belvidere Railroad; that said Northeastern company was a construction company organized for the purpose of constructing a railroad, to be called the Woodstock and Sycamore Traction Company, to extent from Sycamore to Woodstock. A copy of the contract was attached to and made a part of the bill as exhibit A. That contract described what was to be done and the prices to be paid, and contained <sup>no</sup> ~~an~~ allusion to the Woodstock company but said exhibit A purported to be executed by said Northeastern company by C. G. Lumley, president, and the bill elsewhere averred that C. G. Lumley was also president of the Woodstock company. The bill also alleged that on February 9, 1909, Seymour entered into another contract in writing with said Northeastern company to furnish certain other material to said Northeastern company under a contract made exhibit B. Said contract contained no reference to the Woodstock company



[illegible]

except that it provided that payment for the material therein specified was to be partly in bonds of the Woodstock company at par, and partly in stock of the Woodstock company, and partly in cash; but it purported to be executed by said Northeastern company by Charles N. Spenny, secretary, and the bill elsewhere averred that he was also secretary of the Woodstock company. The bill also averred that on March 17, 1910, Seymour entered into a contract with the Interurban company, which the bill alleged was a corporation duly organized under the laws of the state of Illinois, by which Seymour agreed to do certain work for the construction of a railroad from the Chicago Great Western Railroad tracks in Sycamore north to the south side of the tracks of the C.M. & St.P.R.R. in Genoa, according to a survey made by the engineer of the Woodstock company, and it was alleged that said contract was entered into by the Interurban company by Lumley, its president, and Spenny, its secretary, and that the Interurban company was organized for the purpose of constructing the Woodstock and Sycamore Traction Railroad which was then in process of construction between the two railroads above named in Sycamore and Genoa, and it averred that Lumley was president of the Woodstock company and also of the Interurban company, and that Spenny was secretary of the Woodstock company and also of the Interurban company, and a copy of said contract was made exhibit C, and said exhibit contains the prices to be paid. The bill also alleged that on March 17, 1910, Seymour entered into another contract with said Interurban company to do certain work for the construction of said Woodstock company's railroad, covering the distance from the south side of the C.M. & St. B.R.R. tracks at Genoa north to the south side of the tracks of the C. & N.W. R.R. at Marengo, and the bill made the same allegations as to Lumley and Spenny being officers of both companies. Exhibit

-2-

[illegible]

D shows the prices to be paid. The bill also alleged that on October 21, 1912, Seymour entered into another contract with the Waukegan company to construct and finish in every respect to the satisfaction of the general manager of the Waukegan company or his engineer all work necessary to be done to complete the railroad of the Woodstock company from the north side of their track on East Main street in Genoa to a connection with the Woodstock company's car barn north of Genoa. This contract was made Exhibit F. and the bill averred and the exhibit showed that it was executed by said Waukegan company by Spenny as secretary, and the bill averred that Spenny was then secretary of the Woodstock company and that the Waukegan company was then the owner of a majority of the stock of the Woodstock company, and that said contract was for the construction and completion of the railroad of the Woodstock company between said two points last named.

The bill alleged that Seymour furnished the material and did the work required by said respective contracts, and that on an account being taken between Seymour and the Woodstock company and the Waukegan company for said work and material, there is due to Seymour from the Woodstock company and the Waukegan company \$20,000, for which Seymour is entitled to a lien upon the property of the Woodstock company and the Waukegan company, and as against all mortgages or other liens which accrued after the commencement and delivery of the material and work, and that this work was completed on June 1, 1913, and that Seymour has frequently asked the officers of the Waukegan company and the Woodstock company to pay him, and they have refused to do so, and have refused and neglected to complete the terms of said contracts, and have stated that they







have not sufficient funds to pay complainant.

The bill does not allege that Seymour made any contract with the Woodstock company. It does not alleged what relation the Northeastern company and the Interurban company bore to the Woodstock company, or that they bore any relation to it except as above stated. The same is true as to the Waukegan company. There is at least an implication that the Northeastern company and the Interurban company had contracts for the construction of portions of the road of the Woodstock company. If so, this would make Seymour a subcontractor. No relation is shown between the Waukegan company and the Woodstock company except it is averred that at the time the last contract, Exhibit F, was made, the Waukegan company owned a majority of the stock of the Woodstock company. It is at least implied by the nature of the contract, Exhibit F, that the Waukegan company was an original contractor as to that part of the line specified in Exhibit F, and that Seymour was a subcontractor. If Seymour was a subcontractor, then the bill did not state facts alleging a lien, because it did not show that he had done <sup>those</sup> things required by the statute of a subcontractor. It appears to be now claimed, in support of appellant's contention that the original bill stated a case entitling him to a lien upon the property of the Woodstock company, that the allegations that the officers who signed these respective contracts for the Northeastern company, the Interurban company and the Waukegan company were at the same time officers of the Woodstock company, and that under one contract payment was to be made partly in bonds and partly in stock of the Woodstock company, and that as to the last contract by the Waukegan company the latter owned a majority of the stock of the Woodstock



company, are sufficient to show and are equivalent to a  
these three companies were dummy companies and were really  
of them parts of the Woodstock company, and that those contracts  
were really made with Seymour by the Woodstock company. We  
cannot assent to this conclusion. We are of opinion that it is  
not the law that the fact that two corporations have the same president  
is proof that they are one and the same company; nor that  
that result follows if two corporations have the same president and  
the same secretary; nor because one contractor agrees to pay in  
part for work done by delivering bonds or stock of another corporation  
does that prove that the two corporations are the same; nor  
does the fact that one corporation owns the majority of the stock  
in another, if it can lawfully hold such stock, prove that both  
corporations are the same. It is undoubtedly true that such facts  
might have some tendency to show that there was some relation  
between the two corporations in their business dealings or otherwise.  
But such allegations alone do not amount to allegations  
that the one corporation is a dummy for the other, and that what  
the one corporation does the other really does. There is no  
allegation in this bill that any fraud was committed upon Seymour,  
or that he was in any respect deceived. For all that here appears,  
he may have been fully cognizant of every relation that existed  
between these several companies. The bill alleges that the North-  
eastern company and the Interurban company were organized for the  
purpose of constructing parts of this line of road, which means  
that they were organized for the purpose of taking contracts for  
the building of certain portions of this line of road. Under the  
allegations of the bill either Seymour has no case whatever against  
the Woodstock company, or it is only ~~xxxx~~ as subcontractor, and  
for failure to show that he took the steps required by the statute

company, are sufficient to show the independence of  
these three companies from each other and from the  
of them parts of the same company, and that they  
were really made with regard to the same company, and  
can of account to this corporation. We are not aware of  
that the law that the two corporations have the same  
agent is not that they are one and the same company; but that  
that result follows from the fact that the two corporations have  
the same secretary; and because one corporation agrees to be in  
part for work done by delivering bonds or other securities to the  
tion does that show that the two corporations are the same; nor  
does the fact that one corporation has the custody of the books  
in another, it is not necessarily true that each of the  
corporations are the same. It is not necessarily true that each of the  
might have been included in one that would have been included  
between the two corporations in their business dealings or other-  
wise. But even if it were shown that the two corporations  
that the one corporation is a wholly owned subsidiary of the other  
the one corporation and the other really are the same. There is no  
alleged on in this bill that any such relationship exists between  
or that it was in any way intended. We are not aware of any  
that they have been doing business as a single corporation and acting  
between these several companies. We will allege that the corpora-  
tion company and the corporation company were organized for the  
purpose of conducting business in this line of trade, and that  
that they were organized for the purpose of doing business in  
the building of certain portions of this line of road. Under the  
allegations of the bill either company is in the case of being alleged  
the identical company, or it is only a subsidiary of the other, and  
or failure to show that in fact the same company of the same



to establish a subcontractor's lien, the bill states no case.

The first amendment changed the alleged liability of \$20,000 to \$40,000, and that need not further be referred to. It then made certain allegations in regard to the contracts. The second amendment struck out certain language contained in the first amendment in regard to contracts, and added certain language, and therefore the first amendment on that subject will be stated so as to include the changes made by the second amendment. The amendments alleged that this improvement consisted of one entire railroad, extending from Sycamore to Marengo, and was constructed and is operated as one line of railroad; that Seymour was the original contractor for the construction thereof, and said road was constructed by Seymour under the contracts specified in the original bill, and the contract thereafter mentioned in the amendment, called "the force account", and that there were no subcontractors or subcontracts for the construction of said road; that the Northeastern company and the Interurban company were identical and were owned and controlled by the Woodstock company, and the officers and directors of each were the same as the officers and directors of the Woodstock company; that all payments for work and material in the construction of said road under said contracts were made to Seymour directly by the Woodstock company, and that the bonds and stock of the Interurban company and the Northeastern company were sold and the proceeds turned over to the Woodstock company, and said Woodstock company controlled, fully and entirely, the construction of said railroad, and that the stocks and bonds of the Interurban Company and the Northeastern company and all their real and personal property were owned by the Woodstock company;



to establish a relationship with the firm, the firm was not

The first document signed by the firm, the firm was not  
to \$20,000, and the firm was not to be held liable for the same.  
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that while Seymour was engaged in the construction of said work, the Waukegan company, by some arrangement unknown to Seymour, assumed control of the Woodstock company, and that the completion of said line under said contracts was entered into directly with Seymour and the Waukegan company, but the work performed and material furnished by Seymour under said contracts was in the construction of the railroad of the Woodstock company. The amendment further alleged that a part of the construction of said railroad was performed by Seymour under a contract made with the Woodstock company known and denominated as the force account; that said force account related to work and material provided for and covered by said contracts Exhibits A to F inclusive in said original bill, and was a book account or form by which said original contracts were performed by complainant; said force account being kept by the officers of the Woodstock company, and denominated a force account on its books, for the purpose of keeping the account of certain work provided for by said Exhibits A to F inclusive; that under said contract between Seymour and said Woodstock company the Woodstock company advanced money sufficient to pay for the labor and material used in such construction, and that Seymour superintended said construction, and for his services was to receive fifteen per cent of the amount of expenditures shown by said force account; and that under said force account he constructed the line of said road over the streets of Genoa and over the streets of Marengo, and ballasted said track from Sycamore to Genoa and through the city of Genoa and the car barn extension and the line from Sycamore to Genoa and Genoa to Marengo, and that a large part of said \$40,000 now due him and for which this lien is to be enforced is due under said contract denominated the force account.

that this Seymour was engaged in the carrying on of this work,  
the American company, by the arrangement entered in 1860,  
assumed control of the American company, and the American  
of said firm, under all contracts and interests then existing with  
Seymour and the American company, but the work continued and was  
furnished by Seymour under the same conditions as in the American  
of the railroad. The American company, the American company  
alleged that a part of the consideration of said railroad was paid  
formed by Seymour under contract made with the American company  
known and denominated as the American company, and that the American  
related to work on material provided for and covered by this  
contract. Article 2 to 3 inclusive in said contract, and  
was a book account or book of which said material provided was  
performed by Seymour; and that the American company was to be  
of issue of the American company, and denominated as the American  
on its books, for the purpose of keeping the account of certain  
work provided for by said contract 2 to 3 inclusive; and that  
said contract between Seymour and the American company, the  
bookstock company advanced money to Seymour and the American company  
in material used in such construction, and that Seymour intended  
intended said construction, and the American company was to receive  
fifteen per cent of the amount of construction money by said contract  
account; and that said contract account was to be paid to the  
of said road, and the American company was to be paid to the  
American, and that said contract account was to be paid to the  
through the gift of money and the said American company and the American  
from Seymour in 1860 and money to Seymour, and that the American  
of said 100,000 was paid to the American company in 1860  
enforced in the said contract account for the American company.

We think it entirely clear that these amendments state an entirely new case. It makes the other companies merely the agents of a part of the Woodstock company, and alleges that there were no subcontractors, and that these were contracts directly between Seymour and the Woodstock company, and alleges that he was to be paid, not the prices entered in these contracts, but that the Woodstock company furnished and paid for the work and material, and that his compensation was to be fifteen per cent upon the outlay, as superintendent of construction. Appellees contend that even if these allegations had been embodied in the original bill they would not make a case for certain reasons stated, but we deem it unnecessary to inquire into that. These amendments were filed in 1916, some three years after the original bill was filed, and long after the period fixed by the statute had expired, and the fact that this, as a new bill, was barred by the statute appears on the face of the bill, and therefore can be raised by demurrer. *Ilett v Collins*, 103 Ill. 74. As the case stated by the bill as amended does not entitle Seymour to a mechanic's or materialman's lien under the statute, because not filed within the time required thereby, the demurrer was properly sustained thereto, and as Seymour elected to stand by his bill as amended, the bill therefore was properly dismissed, and it is unnecessary to inquire into the other questions discussed by appellees.

The decree is affirmed.



... I think it entirely clear that these amendments affect the  
entirely new case. It makes the other parties out of the  
agents of a part of the Woodstock company, and likewise that there  
were no subcontractors, and that there were none of the  
between between and the Woodstock company, and I repeat to be  
to be paid, not the prices entered in these contracts, but that the  
Woodstock company furnished and paid for the work and material  
and that his compensation was to be fifteen per cent upon the profit,  
an appointment of construction. Appellees contend that even  
if these allegations had been embodied in the original bill they  
would not make a case for certain reasons stated, but we deem it  
unnecessary to inquire into that. These amendments were filed  
in 1916, some three years after the original bill was filed, and  
long after the period fixed by the statute had expired, and the  
fact that this, as we said, was barred by the statute  
on the face of the bill, and therefore can be raised by demurrer.  
Hest v. Collins, 100 Ill. 74. In the case cited by the bill  
amended does not entitle defendant to a judgment or satisfaction,  
and under the statute, cannot be filed within the time required  
thereby, the court was properly sustained in its decision, and we  
directed to stand by his bill as amended, the bill therefore was  
properly dismissed, and it is unnecessary to inquire into the  
questions discussed by the court.

THE COURT IS DIVIDED.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

---

*Clerk of the Appellate Court.*



6382

2580

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,  
in the year of our Lord one thousand nine hundred and fourteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

204 I.A. 154

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day  
of January, A. D. 1915, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
fowllowing, to-wit:



178  
Gen. No. 6393.

John Jaegle , appellee

vs

Appeal from LaSalle.

The estate of Emil Jaegle,  
deceased.           appellant.

Dibell, J.

John Jaegle filed a claim in the Probate Court of LaSalle County against the estate of Emil Jaegle, deceased, to recover \$3,039. made up of \$1,500 for labor and services performed for Emil in his lifetime at his request, and \$1,539 for rent of thirty eight acres of land from March 1, 1906, to March 1, 1915, at \$4.50 per acre, as per lease. The administratrix filed five written objections to the allowance of the claim. The claim was tried in the probate court and allowed in the sum of \$1,432. The administratrix appealed to the circuit court, where the case was tried by a jury and the claim was allowed in the sum of \$1,500 and this is an appeal from said judgment.

John, Gust and Emil Jaegle were brothers and owned small farms not far from each other. John was a bachelor. The others were married and had homes. John for certain years lived with Gust and worked for him for wages. John leased his land to Emil from the first day of March 1905 to the first day of March 1911, at \$150. per year. \$75. payable on September first and \$75 on March first, throughout the period of the lease. Emil died January 19, 1915. Theretofore in 1904, John had ceased to work for Gust and went to live in the home of Emil and lived there the rest of Emil's life and did work on Emil's farm. This claim is for his services while he lived with Emil and for the rent of said farm. Appellee contends that the written objections filed by the administratrix to the claim concede that John rendered the services claimed, and that Emil had the use of the land, and that the only defense set up



John Jaegle, appellee

vs

The estate of Emil Jaegle,

deceased. Appellant.

District, 7.

John Jaegle filed a claim in the Probate Court of Lincoln County against the estate of Emil Jaegle, deceased, to recover \$3,073.25, made up of \$1,500 for labor and services performed for Emil in his lifetime at his request, and \$1,573.25 for rent of thirty-eight acres of land from March 1, 1900, to March 1, 1915, at \$4.00 per acre, in part lease. The administrative claim was filed in the probate court and allowed in the sum of \$1,433. The administrative appealed to the circuit court, where the case was tried by a jury and the claim was allowed in the sum of \$1,500 and this is an appeal from said judgment. John, Gust and Emil Jaegle were brothers and owned small farms not far from each other. John was a bachelor. The others were married and had homes. John for certain years lived with Gust and worked for him for wages. John leased his land to Emil from the first day of March 1900 to the first day of March 1911, at \$150. per year. \$75. payable on September first and \$75 on March first, throughout the period of the lease. Emil died January 15, 1915. Thereafter in 1904, John had ceased to work for Gust and went to live in his home. Emil and lived there the rest of Emil's life and did work on Emil's farm. This claim is for his services while he lived with Emil and for the rent of said land. Appellee contends that the written appeal as filed by the administrative is for the claim contends that John rendered no services claimed, and that he had the use of the land, and that the only balance due up

is that the services were paid for, and that the rent was paid; and that the burden was on the estate to prove such payment, and that payment has not been established, and therefore the judgment should stand. This is a mistake. One of the objections was that neither Emil nor his estate had ever been indebted to claimant for any part of his claim. No denial could be more complete.

Upon a consideration of the evidence concerning the services rendered by John to Emil, we are of opinion that that evidence would not sustain the judgment. There was proof that the going wages for a hired man in that community during those years was from \$25 to \$35 per month and board and lodging during certain months of the year, and board and lodging only during the winter months. There was also proof that Emil made a remark to a neighbor which might be understood to mean that he was paying John \$25 per month. There is no proof that John worked for Emil all that time. There is proof that he did husking for Henry Jaegle a week or so. There is proof that he worked for William Jaegle; that he shocked oats for William Meyers; that he worked for Charles Seip in 1913 and 1914 and earlier years; that he plowed corn, husked corn, shocked oats and put up hay for Seip. There is proof that he worked for Edward Erych once or twice each year. These men did not obtain his services from Emil, but hired John and paid John. A witness wished to hire men for the town on road and bridge work, and applied to Emil to get John for that work, and Emil said he had nothing to do with John, to go and hire him. This was in the presence of John. John did various kinds of work in 1910, 1911, 1913 and 1914 for the town of Richland, for which he was paid by the town sums aggregating \$84.50. The proof shows that Emil and his family paid out much money for John during this period. John

is that the services were paid for, and that the rent was paid; and that the burden was on the estate to prove such payment, and that payment has not been established, and therefore the judgment should stand. This is a mistake. One of the objections was that neither Emil nor his estate had ever been insisted to claimant for any part of his claim. He himself could be more complete.

Upon a consideration of the evidence concerning the services rendered by John to Emil, we are of opinion that that evidence would not sustain the judgment. There are facts that the going wages for a hired man in that community during those years was from \$45 to \$55 per month and board and lodging during certain months of the year, and board and lodging only during the winter months. There was also proof that Emil made a remark to a neighbor which might be understood to mean that he was paying John \$45 per month. There is no proof that John worked for Emil at that time. There is proof that he was helping for Henry Jasie a week or so. There is proof that he worked for William Jasie; that he checked oats for William Mayers; that he worked for Charles Seip in 1914 and 1915 and earlier years; that he plowed corn, husked corn, shocked oats and put up hay for Seip. There is no proof that he worked for Edward Tryon once or twice each year. There was no proof that he obtained his services from Emil, but hired John and paid John. A witness wished to hire men for the town on road and bridge work, and applied to Emil to get John for that work, and Emil said he had nothing to do with John, to go and hire him. This was in the presence of John. John did various kinds of work in 1910, 1911, 1912 and 1914 for the town of Richmond, for which he was paid by the town some aggregating \$8.50. The record shows that Emil and his family paid out much money for John during the period. John



contracted bills with a certain saloon keeper for which Emil paid the total amount of \$58.90. John contracted bills with another saloon keeper and Emil paid those. Alice Jaegle, a daughter of Emil, living at the home, frequently furnished John with money and saw her father, Emil, pay John money at different times. A store keeper testified that John bought goods in his store and seldom paid for them himself, but would have them charged to Emil and Emil paid for them and ~~that~~ the sums paid by Emil for John would average \$25 per year. There is proof that Mrs. Emil Jaegle paid \$20 to \$25 per year at ~~the~~ a store for goods which John bought. There is proof that Emil paid the taxes on John's land and his dues at his church. There is also proof that John was much addicted to the use of intoxicating liquors and was often unfit to work on the farm. There is no proof how much work he did on the farm for Emil, and with all this undisputed proof of his working elsewhere at will and collecting his own pay and having many bills paid by Emil and by Emil's wife, and of money supplied to him by Emil and by Alice, there is no basis in the evidence from which the jury could decide what he ought to be allowed, if anything for his services during the last five years of Emil's life, back of which time the Statute of Limitations, set up in one of the objections, was a defense.

There is no evidence which would sustain this judgment as being for rent. The lease expired on March 1, 1911. There is no proof that any rent up to that date remained unpaid. There is positive proof that it was all paid to that time. If the lease was treated as continued in force the rent thereafter to the death of Emil would be much less than the amount of the judgment. There is positive proof that in March 1911, upon the expiration of the lease, it was agreed between John and Emil

contracted with the estate of John Brown for which Emily paid the total amount of \$25.00. John contracted bills with another saloon keeper and Emily paid those. Alice Jagels, daughter of Emily, living at the home, frequently furnished John with money and saw her father, Emily, pay John money at different times. A store keeper testified that John bought coal in his store and seldom paid for them himself, but would have them charged to Emily and Emily paid for them and that the same was paid by Emily for John would average \$25 per year. There is proof that Mrs. Emil Jagels paid \$20 to \$25 per year at the store for goods when John bought. There is proof that Emily paid the taxes on John's land and his use at his church. There is also proof that John was much addicted to the use of intoxicating liquors and was often unfit to work on the farm. There is no proof how much work he did on the farm for Emily, and with all this undisputed proof of his working elsewhere at will and collecting his own pay and having many bills paid by Emily and by Emily's wife, and of money expended to him by Emily and by Alice, there is no basis in the evidence from which the jury could decide what he ought to be allowed, it anything for his services during the last five years of Emily's life, back of which time the statute of limitations set up in one of the objections, was a defense.

There is no evidence which would justify this judgment as being for rent. The lease expired on March 1, 1911. There is no proof that any rent up to that date remained unpaid. There is positive proof that it was all paid to that time. If the lease was treated as continued in force the rent therefor to the death of Emily would be much less than the amount of the judgment. There is positive proof that in March 1911, upon the expiration of the lease, it was agreed between John and Emily



that John should have his home there and have his board and clothing and spending money and that Emil should have the use of the land. There is proof of statements by John to others indicating that such an arrangement was made, and much proof tending to show that thereafter the parties lived in the family relation referred to in *Heffron v Brown*, 155 Ill. 332, and many other cases.

In the view we take of the case the proof on neither branch of the claim will support an allowance to appellee. At the trial appellant waived all objection to the competency of appellee as a witness in his own behalf and that made him a competent witness for that trial, and if he had any contract with Emil to pay him wages or rent after the expiration of the lease, March 1, 1911, he could have proved what that contract was, and how much work he did for Emil. He did not avail himself of the evidence thus placed within his control, and therefore cannot rely upon the difficulty of establishing his case because of his being an incompetent witness.

The judgment is therefore reversed and the cause remanded.

that John should have his home there and have his board and clothing and spending money and that Emil should have the use of the land. There is a roof of statements by John to others indicating that such an arrangement was made, and such proof tending to show that thereafter the parties lived in the family relation referred to in *Helson v Brown*, 125 Ill. 323, and many other cases.

In the view we take of the case the proof on neither branch of the claim will support an allowance to a appellee. At the trial appellant waived all objection to the competency of appellee as a witness in his own behalf and that made him a competent witness for that trial, and if he had any contract with Emil to pay him wages or rent after the expiration of the lease, March 1, 1911, he could have proved that that contract was, anyhow much work he did for Emil. He did not avail himself of the evidence thus placed within his control, and therefore cannot rely upon the difficulty of establishing his case because of his being an incompetent witness.

The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



65

2581

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,  
in the year of our Lord one thousand nine hundred and fourteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

204 I.A. 153

FEB 10 1917

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day  
of January, A. D. 1915, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
fowllowing, to-wit:





Gen. No. 3333.

E. A. Kelly, appellee.

vs

Appeal from LaSalle.

Charles Sanderson, appellant.

Dibell, J.

Kelly sued Sanderson in the Circuit Court of LaSalle County in trespass for an assault and battery. Sanderson pleaded not guilty and son assault demesne. A replication was filed, the cause was tried and Kelly had a verdict and a judgment for \$300 from which Sanderson appeals. He argues that Kelly made the first assault; that, if not, he provoked the assault and thereby forfeited the right to exemplary damages; and that the sum allowed can only be sustained as exemplary damages; and that because of the provocation by Kelly, it was error to instruct the jury on the subject of exemplary damages.

In the center of a block in the city of Ottawa is a public court or square and from it an alley leads north to one street and south to another. Kelly lives on a lot that backs up against or by the side of said square and owns another lot next east of the north alley occupied by a tenant. Sanderson lives next west of the north alley with a barn facing on the court. The city had filled the court to some extent, by depositing material therein. The people whose lots adjoined the court had deposited ashes therein very generally and the court was higher than Kelly's adjoining lots and water from the court would flow upon his garden in the rear of his lot and on his tenant's lot. To avoid this Kelly had made an embankment with the ashes in the court near his property, some six or eight inches high, which prevented the water from running upon his property. Murray, Sanderson's hired man, on the day in question backed Sanderson's surrey out of the barn into the court to

Kelly and Sanderson in the District Court of Dallas

County in trespass for an assault and battery. Sanderson

pleaded not guilty and an assault defense. A replication

was filed, the cause was tried and Kelly had a verdict and a

judgment for \$800 from which Sanderson appeals. He argues that

Kelly made the first assault; that, if not, he provoked the

assault and thereby forfeited the right to exemplary damages;

and that the sum allowed can only be sustained as exemplary

damages; and that because of the provocation by Kelly, it was

error to instruct the jury on the subject of exemplary damages.

In the center of a block in the city of Dallas is a public

court or square and from it an alley leads north to one street

and south to another. Kelly lives on a lot that backs up

against or by the side of said square and owns another lot

next east of the north alley occupied by a tenant. Sanderson

lives next west of the north alley with a barn facing on the

court. The city had filled the court to some extent, by deposit-

ing material therein. The people who live adjacent to the court

had deposited ashes therein very generally and the court was

higher than Kelly's adjoining lots and water from the court

would flow upon his garden in the rear of his lot and on his

tenant's lot. To avoid this Kelly had made an arrangement with

the ashes in the court near his property, some six or eight

inches high, which prevented the water from running upon his

property. Whereby, Sanderson's first son, on the day in question

backed Sanderson's buggy out of the back into the court in

hitch a horse to it, and found so much water in the court that he told Sanderson's little boy to open this dam and let the water through. The boy started to do ~~xx~~ it. Kelly came and ordered him away. He went and Sanderson came with a hoe. He began to dig an opening through the ashes. Kelly got a shovel and built up the barrier as fast as Sanderson hoed it down. According to the evidence introduced by Kelly, Sanderson then struck Kelly with the hoe on the front of Kelly's right leg, and then endeavored to strike him over the head with the hoe, but Kelly threw up an arm and warded off the blow from his head and received it on his shoulder. Then Sanderson struck Kelly a blow in the face with his fist. Then Kelly struck Sanderson on the side of the head with the flat side of the shovel. Then Kelly threw down his shovel and began a combat with his fists and Murray separated them. Sanderson introduced proof tending to show that Kelly was the first assailant. Sanderson testified that he did not remember striking Kelly with the hoe at all, but that the combat according to his recollection began ~~with~~ by Kelly striking Sanderson on the face with a shovel. There was an apparent preponderance of testimony in favor of Kelly. The blow with the blade of the hoe cut through Kelly's trousers and drawers and sock and cut a gash in his leg an inch deep and an inch and a half long. The jury believed the testimony introduced by Kelly and ~~did~~ disbelieved that introduced by Sanderson. The trial judge approved the verdict. The evidence furnishes no ground for us to interfere with the conclusion of the jury. The injury testified to required the services of a physician or surgeon at different times for two weeks, and Kelly, who was a dentist, was ~~xxx~~ unable to attend to his patients for some little time. He carries a scar from the wound. At different times since, he has suffered pain after the wound healed. At the trial, eight months after the encounter, it had been two months since he had



hitch a horse to it, and found so much water in the court that  
 he told Sanderson's little boy to open this jam and let the  
 water through. The boy started to do so. Kelly came and stopped  
 him away. He sent and Sanderson came with a hoe. He began to  
 dig an opening through the jam. Kelly got a shovel and built  
 up the barrier as fast as Sanderson could do it. According to  
 the evidence introduced by Kelly, Sanderson then struck Kelly  
 with the hoe on the front of Kelly's right leg, and then endeavored  
 to strike him over the head with the hoe, but Kelly threw up an  
 arm and warded off the blow from his head and received it on his  
 shoulder. Then Sanderson struck Kelly a blow in the face with  
 his fist. Then Kelly struck Sanderson on the side of the head  
 with the left side of the shovel. Then Kelly threw down his  
 shovel and in a combat with his fists and Murray separated  
 them. Sanderson introduced cross evidence to show that Kelly  
 was the first assailant. Sanderson testified that he did not  
 remember striking Kelly with the hoe at all, but that the  
 combat according to his recollection began with Kelly striking  
 Sanderson on the face with a shovel. There was an apparent con-  
 siderance of testimony in favor of Kelly. The blow with the  
 blade of the hoe on the right Kelly's trousers and drawers  
 and took out a gap in his leg and it chafed and burned and  
 a half long. The jury believed the testimony introduced by Kelly  
 and was dissatisfied that introduced by Sanderson. The trial  
 judge approved the verdict. The evidence furnishes no ground  
 for us to interfere with the conclusion of the jury. The injury  
 testified to require the services of a physician or surgeon at  
 different times for two weeks, and Kelly, who was a testist,  
 was xxx unable to attend to his patients for some little time.  
 He carries a scar from the wound. At different times since, he  
 has suffered pain after the wound healed. At the trial, eight  
 months after the encounter, it had been two months since he had



suffered pain in that place. Very likely the jury awarded something as exemplary damages.

The court gave an instruction on the subject of exemplary damages. It is not questioned but that it is a correct statement of the law on that subject. Appellant contends that by building up this dam as fast as Sanderson dug it away, Kelly provoked the assault and therefore could not recover any exemplary damages, and therefore the court should not have given the instruction. Kelly might have very readily foreseen that Sanderson, as a result of his action, would bring the dam to the attention of the street authorities or of the city council or might sue him. We do not think that it necessarily follows that Kelly should have anticipated that Sanderson would make a ~~vicious~~ violent assault upon his person. It is not true that every provocation by a plaintiff deprives him of the right to exemplary damages for an assault by the person whom he has provoked. In *Drohn v Brewer* 77 Ill. 380 where the defendant in such a case asked an instruction depriving the plaintiff of the right to exemplary damages if the assault was made with considerable provocation and without malice, the court there said that, even if the assault was made with considerable provocation and without malice, yet if it was of a wanton, gross and outrageous character plaintiff might recover exemplary damages. That this is a question for the jury and not for the court is not only implied in that case, but also in *Chicago Traction Co. v Mahoney*, 330 Ill. 562. In order to refuse this instruction, the court must have determined from the evidence that there was a sufficient provocation so that Kelly ought to be barred of exemplary damages. This was one of the issues which the jury were to decide and which the court could not take from them. Kelly was entitled to that instruction. In determining this question the jury

suffered pain in that place. Very likely the jury awarded  
 something as exemplary damages.  
 The court gave an instruction on the subject of exemplary  
 damages. It is not questioned but that it is a correct statement  
 of the law on that subject. Appellant contends that by putting  
 up this case as that a defendant who is not guilty of an  
 assault and therefore could not recover any exemplary damages,  
 and therefore the court should not have given the instruction.  
 Kelly might have very readily for want of a defendant, as a re-  
 sult of his action, would bring the case to the attention of the  
 street authorities or of the city council or might be killed.  
 We do not think that it necessarily follows that Kelly would  
 have anticipated that defendant would make a statement violent  
 assault upon his person. It is not true that every provocation  
 by a plaintiff deprives him of the right to exemplary damages  
 for an assault by the person whom he has provoked. In *Dubin*  
*v. Brewer* 77 Ill. 280 where the defendant in such a case was  
 an instruction depriving the plaintiff of the right to ex-  
 emplary damages if the assault was made with non-defensive pro-  
 vocation and without malice, the court there said that, even  
 if the assault was made with considerable provocation and without  
 malice, yet if it was of a wanton, gross and outrageous character  
 plaintiff might recover exemplary damages. That is the  
 question for the jury and not for the court is not only settled  
 in that case, but also in *Chicago Traction Co. v. Hancock*, 230  
 Ill. 382. In order to reverse this instruction, the court must  
 have determined from the evidence that there was a sufficient  
 provocation so that Kelly could not be held to be guilty of an assault.  
 This was one of the issues which the jury were to decide and  
 which the court could not take from them. Kelly was entitled  
 to that instruction. In determining the question as to

might have seen much in the demeanor of the respective parties upon the stand which aided them in determining whether the defendant was governed by malice in what he did. The exemplary damages assessed by the jury were moderate in amount.

The judgment is affirmed.

might have been much in the honor of the respective parties

upon the stand which elicited in determining whether the  
defendant was covered by police in that he did. The exemplary

damages assessed by the jury were moderate in amount.

The judgment is affirmed.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*





6388 (2582)  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,  
in the year of our Lord one thousand nine hundred and sixteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

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204 I.A. 157

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Gen. No. 6388.

Harlan Watson, appellee

vs

Appeal from Warren.

W. B. Lozier, appellant.

Dibell, J.

Appellee sued appellant before a justice of the peace in forcible detainer to recover possession of one hundred acres of land in Warren County and there was a verdict and a judgment against him and he appealed to the circuit court, where there was a verdict and a judgment for him, from which the defendant appeals.

Appellant contends that the court erred in overruling a motion for a continuance made by him. The bill of exceptions does not contain any motion for a continuance nor any proofs in support thereof, nor any denial of such a motion. The clerk cannot certify to the making of such motions nor the proof heard thereon nor the action of the court thereon, as is attempted in this case. Therefore no such question is presented by this record. *Bromwell v Est. of Bromwell* 139 Ill. 424.

It is alleged that the court erred in proceeding to a trial in the absence of the appellant. There is nothing in the bill of exceptions to show that the court did proceed to trial in the absence of appellant nor that his counsel made any objection to so doing. It is said in argument that appellants counsel refused to take any part in the trial. The bill of exceptions shows that they did announce during the empaneling of the jury that they did not desire to take any further part in the trial, and also that at the close of plaintiffs evidence they advised the court that they did not desire to offer any evidence. But, nevertheless, they did take part in the trial, for they objected on behalf of appellant to certain evidence

Harian Watson, appellee

Appeal from Warren.

vs

W. B. Lozier, appellant.

Dubell, J.

Appellee sued appellant before a Justice of the peace in forcible detainer to recover possession of one hundred acres of land in Warren County and there was a verdict and a judgment against him and he appealed to the circuit court, where there was a verdict and a judgment for him, from which the defendant appeals.

Appellant contends that the court erred in overruling a motion for a continuance made by him. The bill of exceptions does not contain any motion for a continuance nor any proofs in support thereof, nor any denial of such a motion. The clerk cannot certify to the making of such motions nor the proof heard thereon nor the action of the court thereon, as is attempted in this case. Therefore no such question is presented by this record. *Brownell v Est. of Brownell* 132 Ill. 484.

It is alleged that the court erred in proceeding to a trial in the absence of the appellant. There is nothing in the bill of exceptions to show that the court did proceed to trial in the absence of appellant nor that his counsel made any objection to do so. It is said in argument that appellant's counsel refused to take any part in the trial. The bill of exceptions shows that they did announce during the examination of the jury that they did not desire to take any further part in the trial, and also that at the close of plaintiff's evidence they advised the court that they did not desire to offer any evidence. But, nevertheless, they did take part in the trial, for they objected on behalf of appellant to certain evidence



offered by appellee and that objection was sustained.

The proofs show that H. N. Crozier leased these premises to appellant for the year from March 1, 1915, to March 1 1916, by a written instrument, dated October 20, 1914, and therein appellant agreed that at the expiration of the term of the lease, he would yield up possession to Crozier without further demand or notice. Appellant took possession under that lease and occupied the land. On October 20, 1915, Crozier leased the same premises to appellee for the year from March 1, 1916 to March 1, 1917. Appellant did not give up possession and on March 8, 1916, appellee unnecessarily served him with a written demand for possession and thereupon began this suit. Appellant retained possession. It is argued that the court erred in admitting in evidence the lease from Crozier to appellee. The lease from Crozier to appellant authorized Crozier to bring such an action in his own name. Under clause 4 of Section 2 of the Forcible Entry & Detainer Act, the person entitled to the possession of lands may be restored thereto by suit under that act when any lessee of lands holds possession without right after determination of the lease by its own terms. Appellee was entitled to offer the lease to himself to show that he was the person entitled to possession at the time he began the suit. Section 14 provides that the assignee of the lessor of any demise shall have the same remedy by entry, action or otherwise for the non-performance of any agreement in the lease, as his grantor or lessor might have had, if the reversion had remained in said lessor or grantor. By the second lease appellee became the grantee within the meaning of said act. Bell v Chadwick, 46 Ill. 28; Floersheim v Baude, 110 Ill. App. 536; Grand Union Tea Co. v Hanna, 164 Ill. App. 570. The evidence established the signatures to these instruments and made a case for appellee and the court, in the absence of any proof by appellant, properly

1. Remedy Act

offered by appellee and that objection was sustained.

The records show that H. W. Crozier leased these premises to appellant for the year from March 1, 1912, to March 1, 1916, by a written instrument, dated October 20, 1914, and wherein appellant agreed that at the expiration of the term of the lease, he would yield up possession to Crozier without further demand or notice. Appellant took possession under that lease and occupied the land. On October 20, 1915, Crozier leased the same premises to appellee for the year from March 1, 1915, to March 1, 1917. Appellant did not give up possession and on March 8, 1916, appellee unnecessarily served him with a written demand for possession and thereupon began this suit. Appellant retained possession. It is argued that the court erred in admitting in evidence the lease from Crozier to appellee. The lease from Crozier to appellant authorized Crozier to bring such an action in his own name. Under clause 4 of Section 2 of the Forcible Entry & Detainer Act, the person entitled to the possession of lands may be restored thereto by suit under that act when any lease of lands holds possession without right after termination of the lease by its own terms. Appellee was entitled to offer the lease to himself to show that he was the person entitled to possession at the time he began the suit. Section 14 provides that the assignee of the lease of any of the premises shall have the same remedy by entry, action or otherwise as the non-performance of any agreement in the lease, as his grantor or lessor might have had, if the reversion had remained in said lessor or grantor. By the second lease appellee became the grantee within the meaning of said act. *Will v. Quastick*, 48 Ill. 55; *Fischerheim v. Eadie*, 110 Ill. App. 350; *Grant*, *Union Tea Co. v. Nelson*, 181 Ill. App. 570. The evidence established the signature to these instruments and made a case for appellee and the court, in the absence of any proof by appellant, properly

directed a verdict for appellee, and the record shows no reason why the court should have granted a new trial.

The judgment is therefore affirmed.

afforded a verdict for a verdict, and the record shows no reason why the court should have granted a new trial.

The judgment is affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate,  
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*





6896

2583

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,  
in the year of our Lord one thousand nine hundred and fourteen,  
within and for the Second District of the State of Illinois:  
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

204 I.A. 158

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BE IT REMEMBERED, that afterwards, to-wit: on the 27th day  
of October, A. D. 1914, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:

FEB 1 1915



Gen. No. 6396.

Irene Faletti, Admr. appellee

vs

Appeal from Putnam.

W. L. Child, appellant.

Dibell, J.

Irene Faletti, Administratrix de bonis non of the estate of Edward McCabe, deceased, brought this suit against W. L. Child in the Circuit Court of Putnam County and filed a declaration containing the common counts, and therewith an affidavit of claim, which stated that the demand of plaintiff was for money lent by McCabe to defendant and interest thereon, which money and interest was still unpaid, and for moneys of McCabe collected by Child in the lifetime of McCabe from parties owing McCabe and which had never been accounted for or paid to McCabe or his estate, and that there is due to plaintiff from defendant \$1,000. Child filed pleas of the general issue, the Statute of Limitations, and that the transactions related to a partnership and were not all the transactions of the partnership and that the affairs of the partnership had never been settled. With this appellant filed an affidavit of merits. There was a jury trial and a verdict and a judgment for plaintiff in the sum of \$795.83, from which defendant appeals.

Pursuant to an order of court appellee filed a bill of particulars, the first item of which concerned a certain check for \$600 which it said was money lent by McCabe to Child and cashed by Child; and the second was for certain moneys arising from the sale of two teams of mules by Child, which were alleged to have been the property of McCabe. There were three other items in the bill of particulars, one of \$35.00 one of \$100.00 and one of \$82.50. The evidence at the trial was confined to the first two items. Appellant argues that the verdict was for the amount of the check. Appellee argues that that conclusion

Irene Falletti, Appellee

vs  
Appellant from Putnam.

W. L. Child, Appellant.

Dibell, J.

Irene Falletti, Administratrix as sole non of the estate of Edward McCabe, deceased, brought this suit against W. L. Child in the Circuit Court of Putnam County and filed a declaration containing the common counts, and therewith an affidavit of claim, which stated that the demand of plaintiff was for money lent by McCabe to defendant and interest thereon, which money and interest was still unpaid, and for moneys of McCabe collected by Child in the lifetime of McCabe from parties owing McCabe and which had never been accounted for or paid to McCabe or his estate, and that there is due to plaintiff from defendant \$1,000. Child filed pleas of the general issue, the Statute of Limitations, and that the transactions related to a partnership and were not all the transactions of the partnership and that the affairs of the partnership had never been settled. With this appellant filed an affidavit of denial. There was a jury trial and a verdict and a judgment for plaintiff in the sum of \$785.83, from which defendant appeals. Pursuant to an order of court appellee filed a bill of particulars, the first item of which concerned a certain check for \$800 which it said was money lent by McCabe to Child and earned by Child; and the second was for certain moneys advanced from the sale of two tracts of land of Child, which were alleged to have been the property of McCabe. There were three other items in the bill of particulars, one of \$25.00 one of \$100.00 and one of \$85.83. The witness at the trial was confined to the first two items. Appellant argues that the verdict was for the amount of the check. Appellee argues that that conclusion



cannot be drawn from the record. We are satisfied that the verdict was upon the check only. The verdict is just the amount of the check, with interest at five per cent from the date of the check to the date of the verdict. There was no reason why the whole check should not be allowed, if any of it. The proof concerning the mules would not authorize so large a verdict and if the verdict was based upon the mules ~~xxx~~ alone, it is excessive.

The check was drawn by McCabe in favor of Child on the Spring Valley City Bank, was dated October 12, 1909, and was for \$600. Appellee contends that by his affidavit of merits, appellant stated as his only defense to that item that he never received the \$600; and that under the statute that statement excluded all other defenses. This is a misapprehension of the affidavit of merits. The affidavit stated on that subject that McCabe never loaned appellant \$600 on October 12, 1909, nor does appellant owe McCabe or his legal representative said sum, with interest from October 12, 1909, and that appellant does not owe appellee for any money lent or advanced, paid out for or in behalf of appellant, or for any sum of money set out in the declaration. The bare fact that appellant received this check from McCabe and obtained the money upon it does not create the presumption that McCabe loaned appellant \$600 but the ordinary presumption is that the money was paid because it was due and owing by McCabe to appellant. *Bromwell v Estate of Bromwell*, 139 Ill. 424. To the same effect was *Kinahan v Butler*, 133 Ill. App. 459; and *MacKenzie v Barrett*, 148 Ill. App. 414. In *Miller & Graves v Pratz*, 179 Ill. App. 204, we followed these and other decisions and held that "where one pays money or delivers a check for money to another and there is no explanation of the cause of such payment, or if business

cannot be drawn from the record. We are satisfied that the verdict was upon the check only. The verdict is just the amount of the check, with interest at five per cent from the date of the check to the date of the verdict. There was no reason why the whole check should not be allowed, if any of it. The verdict concerning the mules would not authorize so large a verdict as the verdict was based upon the mules alone, it is excessive.

The check was drawn by McCabe in favor of Child on the Spring Valley City Bank, was dated October 12, 1902, and was for \$600. Appellee contends that by his affidavit of verity, appellee stated as his only defense to that item that he never received the \$600; and that under the statute that statement excluded all other defenses. This is a misapprehension of the affidavit of verity. The affidavit stated on that subject that McCabe never loaned appellee \$600 on October 12, 1902, nor does appellee owe McCabe or his legal representative said sum, with interest from October 12, 1902, and that appellee does not owe appellee for any money lent or advanced, paid out for or in behalf of appellee, or for any sum of money set out in the declaration. The bare fact that appellee received this check from McCabe and obtained the money upon it does not create the presumption that McCabe loaned appellee \$600 but the ordinary presumption is that the money was paid because it was due and owing by McCabe to appellee. *Brownell v. Estate of Brownell*, 130 Ill. 424. To the same effect was *Linahan v. Butler*, 133 Ill. App. 427; and *McKinnate v. Barrett*, 143 Ill. App. 414. In *Miller & Graves v. Pratt*, 178 Ill. App. 304, we followed these and other decisions and held that "where one pays money or delivers a check for money to another and there is no explanation of the cause of such payment, or if business

relations only exist between the parties, the ordinary presumption is that the money was paid because it was due and owing." The only debatable question in this case is whether the evidence overcomes this presumption. Antone Faletti testified that he was present at an interview between Mrs. McCabe, C. N. Hatterich, appellant and his wife, after the death of McCabe at which Mrs. McCabe held in one hand a certain book, apparently a book of accounts which is not in evidence, and in the other hand this check, and said to appellant that Mr. McCabe had an account against him and that she would like to have it settled and that there were some mules, some horses and \$600 that McCabe had advanced by check and she handed the check to appellant and he looked at it and said: "Yes, I got that money;" that Mrs. McCabe then said to appellant: "Why dont you pay it if you got it;" and appellant then said something which the witness could not understand and Mrs. McCabe got angry and excited, and the three men went away and had another conversation elsewhere which was not offered in evidence. That appellant got the money on the check has no tendency to show that it was a loan to appellant. The argument of appellee is that as Mrs. McCabe said to appellant that McCabe had advanced the money by check and as appellant said "Yes" this showed that he thereby admitted that it was an advancement. Twice thereafter during the direct examination of the witness appellee's counsel asked him to repeat what appellant said and each time he left out the word "Yes" and only gave that answer as "I received the money". Appellant was a competent witness as to that conversation and he says that what he said in addition which the witness Faletti did not understand, was that he told Mrs. McCabe that he did not owe McCabe's estate anything. Faletti having twice omitted the word "Yes" in his answer,





we are of opinion that the jury were not warranted in finding that appellant admitted in that conversation that McCabe advanced this \$600 to him. Therefore we are of opinion that the evidence did not make a case for appellee. As the case must be tried again, we suggest that an instruction given for plaintiff that stated that this \$600 item was based on the check in evidence was calculated to mislead, as in order to sustain that item it was necessary, not merely to show the check, but also that it was an advancement or loan to appellant.

The judgment is therefore reversed and the cause remanded.



we are of opinion that the jury were not warranted in  
finding that a plaintiff admitted in that conversation that he  
had advanced this \$800 to him. Therefore we are of opinion  
that the evidence did not make a case for a verdict. As the  
case must be tried again, we suggest that an instruction  
given for plaintiff that stated that this \$800 item was based  
on the check in evidence was calculated to mislead, as in  
order to sustain that item it was necessary, not merely to show  
the check, but also that it was an advancement or loan to repai-  
ment.

The judgment is therefore reversed and the cause  
remanded.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

---

*Clerk of the Appellate Court.*



64-100  
(2584)  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,  
in the year of our Lord one thousand nine hundred and fourteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

204 I.A. 160

FEB 1 1917

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day  
of January, A. D. 1915, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
fowllowing, to-wit:





Gen. No. 6403.

Emma Griggs, appellee

vs

Appeal from Grundy.

A. R. Griggs, et al.

(John G. Petteys, appellant.)

Dibell, J.

Emma Griggs filed a bill in equity against A. R. Griggs and his attorney John G. Petteys. She afterwards amended the bill and thereafter applied for a temporary injunction. Petteys was the only defendant served, as defendant Griggs lived in Iowa. A change of venue was asked for and denied. The injunction was granted and an injunction bond filed. This is an appeal by Petteys from the interlocutory order granting the temporary injunction.

Appellant argues that the court erred in denying his application for a change of venue, and that, if the change of venue was improperly refused or should have been granted, then the presiding judge had no jurisdiction to grant this injunction, and the order is therefore void, and hence, on this appeal from this interlocutory order granting an injunction, he may raise the question of the prior error. If counsel is correct in this, which we do not decide, yet the question argued is not presented. The abstract only shows that a petition for a change of venue was filed and denied. It does not show the contents of the petition nor whether a change of venue was sought from the county or from some one or all of the judges. It does not show what ground for a change of venue was alleged. A verification of the petition is not shown. It is familiar doctrine that any error alleged on appeal must be shown in the abstract and that the court will not search the record to find some error, which

Emma Griggs, appellee

vs  
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Appellant argues that the court erred in denying his application for a change of venue, and that, if the change of venue was improperly refused or should have been granted, then the presiding judge had no jurisdiction to grant this injunction, and the order is therefore void, and hence, on this appeal from this interlocutory order granting an injunction, he may raise the question of the prior error. If counsel is correct in this, which we do not decide, yet the question argued is not presented. The abstract only shows that a petition for a change of venue was filed and denied. It does not show the contents of the petition nor whether a change of venue was sought from the county or from some one or all of the judges. It does not show what ground for a change of venue was alleged. A verification of the petition is not shown. It is familiar doctrine that any error alleged on appeal must be shown in the abstract and that the court will not search the record to find some error, which

has not been shown in the abstract. Moreover, petitions and motions for a change of venue and affidavits in support of the same and the ruling of the court thereon, can only be made a part of the record by being incorporated in the bill of exceptions or certificate of evidence. *People v Ellsworth*, 261 Ill. 275; *Macierzpolska v Czarnecki*, 272 Ill. 34, and cases cited in those opinions. This rule applies to chancery cases as well as actions at law. *Heacock v Hosmer*, 109 Ill. 345; *Duquoin Water Works Co. v Parks*, 207 Ill. 46. This record contains no certificate of evidence, embodying said petition and affidavit and the order of the court. The record therefore does not show any error in refusing the change of venue.

The bill alleged that Mrs. Griggs was seventy six years old and a widow; that she owned a life estate in six pieces of real estate in or near Morris; and that there were four dwelling houses on said tracts, bringing her an average rental of \$32.00 per month, and the rest of the tracts brought her \$55 rent per year, and that she has a homestead on said premises; that in September last, her son, A. R. Griggs, requested her to go to the law office of Petteys and she did so, and that when she arrived there A. R. Griggs and Petteys told her that they would get her son, Bert Griggs, out of the asylum at Kankakee, but that they wanted her to assign sufficient rents to pay therefor, and presented her a paper which they represented was a power of attorney to A. R. Griggs to collect said rent for a short time to pay said expenses; that she depended on said representations and believed them to be true and signed the paper; that shortly thereafter she borrowed from the bank and paid A. R. Griggs \$50.00 to cover such expenses; that A. R. Griggs filed said instrument for record, and she thereafter learned that it was a lease to A. R. Griggs of all said premises for twenty years;



has not been shown in the abstract. Moreover, petitions and motions for a change of venue and affidavits in support of the same and the ruling of the court thereon, can only be made a part of the record by being incorporated in the bill of exceptions a certificate of evidence. People v. Ellsworth, 281 Ill. 375; Macierzpolaka v. Gzarski, 273 Ill. 34, and cases cited in those opinions. This rule applies to chancery cases as well as actions at law. Hescock v. Hosmer, 108 Ill. 345; Dupont v. Water Works Co. v. Parks, 307 Ill. 46. This record contains no certificate of evidence, embodying said petition and affidavit and the order of the court. The record therefore does not show any error in refusing the change of venue.

The bill alleged that Mrs. Grigya was seventy six years old and a widow; that she owned a life estate in six pieces of real estate in or near Morris; and that there were four dwelling houses on said tracts, bringing her an average rental of \$35.00 per month, and the rest of the tracts brought her \$25 rent per year, and that she has a housestead on said premises; that in September last, her son, A. R. Grigya, requested her to go to the law office of Pettys and the did so, and that when she arrived there A. R. Grigya and Pettys told her that they could get her son, Bert Grigya, out of the asylum at Yankawee, but that they wanted her to assign and tenant rents to pay their law and presented her a paper which they represented was a power of attorney to A. R. Grigya to collect said rent or a short time to pay said expenses; that she assented on said representations and believed them to be true and signed the paper; that shortly thereafter she borrowed from the bank and said A. R. Grigya \$20.00 to cover such expenses; that A. R. Grigya filed said instrument for record, and the court after learning that it was issued to A. R. Grigya of all said premises for twenty years;

that Petteys acting for Griggs, collected the rents as they became due and paid her a part thereof, and retained the rest, and that, even if this were a valid lease, A. R. Griggs had defaulted therein by failing to pay her the rent therein agreed and that A. R. Griggs is now endeavoring to get her out of the possession of the premises. She alleged that her signature to said paper was obtained by the fraud and misrepresentation of A. R. Griggs and Petteys. She asked that the lease be cancelled and that Petteys and Griggs be restrained from collecting the rent. We are of opinion that these averments authorized a temporary injunction.

It is argued that the bill does not pray for a temporary injunction. It does not in those exact words, but it does pray that the defendants be restrained from collecting the rents or from interfering with the property till the further order of the court, and that means a temporary injunction. It is argued that the bill is not verified. There is an affidavit of complainant to the original bill, in which she stated that she ~~had~~ ~~xxxxx~~ has heard it read and that the same is true in substance and fact. There is an affidavit to the amendment, in which she says that she has read it and that the allegations therein contained are true in substance and in fact.

The order is affirmed.



that Petseye acting for Griggs, collected the rents as they became due and paid her a part thereof, and retained the rest, and that, even if this were a valid lease, A. R. Griggs had delinquent therein by failing to pay her the rent therein agreed and that A. R. Griggs is now endeavoring to get her out of the possession of the premises. She alleged that her signature to said paper was obtained by the fraud and misrepresentation of A. R. Griggs and Petseye. She asked that the lease be cancelled and that Petseye and Griggs be restrained from collecting the rent. We are of opinion that these averments authorized a temporary injunction.

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STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this \_\_\_\_\_  
day of \_\_\_\_\_ in the year of our Lord one  
thousand nine hundred and \_\_\_\_\_

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*Clerk of the Appellate Court.*



CITY OF CHICAGO,  
Defendant in Error.

vs.

VICTOR BISSO,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 162

MR. PRESIDING JUSTICE MANUALLY  
DELIVERED THE OPINION OF THE COURT.

Defendant was tried by a jury and found guilty of conducting a disorderly house in violation of section 2019 of the Municipal Code of Chicago. Upon a verdict he was fined \$100.

It is sought to have the judgment reversed (1) on the ground that a motion for a change of venue was improperly denied. We cannot pass upon this for the reason that it has not been properly preserved for our review. Section 23 of the Municipal Court Act with reference to cases of this kind provides that parties desiring to preserve such matters for review should do so by making "a correct statement of such other proceedings in the case as such party may desire to have reviewed." There has been an attempt made to preserve the proceedings upon this motion in what is called a bill of exceptions, which is not in accordance with the statute. Furthermore, even if we should consider the matters appearing in this document it would not avail the defendant, for the reason that it appears that the affidavits supporting the motion for change of venue were sworn to before the defendant's attorney in the case. Such affidavits will

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 DISTRICT IN BOSTON  
 WEST OF BOSTON  
 DISTRICT IN BOSTON  
 WEST OF BOSTON  
 DISTRICT IN BOSTON

2041.A.102

DELIVERING THE GOODS OF THE COURT

THE COURT HAS ORDERED THAT THE GOODS OF THE COURT  
 BE DELIVERED TO THE COURT AT THE PLACE WHERE THE  
 GOODS OF THE COURT ARE KEPT.

IT IS ORDERED THAT THE GOODS OF THE COURT  
 BE DELIVERED TO THE COURT AT THE PLACE WHERE THE  
 GOODS OF THE COURT ARE KEPT.



not be received or considered by the court. "By the general practice of all the courts, affidavits sworn before the attorney or solicitor in the cause cannot be read." Tidd's Practice 494; see, also, City v. Simonetti, this court No. 32600, opinion filed January 22, 1917, and cases therein cited.

(2) It is said that plaintiff failed to prove its case. In our view of the evidence, which it is unnecessary to detail and some of it too vulgar to print, the charge was amply sustained. Moreover, we must assume the sufficiency of the evidence to support the charges made, for the reason that the ordinance which the defendant is charged with having violated is not before us. We cannot take judicial notice of this, and must therefore presume the correctness of the verdict. Simonetti case, supra, and cases therein cited.

We are not of the opinion that it constitutes reversible error for the court to curtail time for argument of a motion for a new trial.

There appearing no substantial grounds for reversal, the judgment is affirmed.

AFFIRMED.

not be revised or corrected by the court. The law  
general practice of all the courts, especially when before  
the attorney or solicitor in the name of the court.  
This practice is; see, also, Gray v. Houghton, this  
court No. 81800, opinion filed January 25, 1911, and cases  
therein cited.

(2) It is held that a witness is bound to prove  
the case. In our view of the evidence, which is in  
necessity to detail and some of it is not in print,  
the charge was easily sustained. However, we must assume  
the sufficiency of the evidence to support the charges  
made, for the reason that the ordinance which the defendant  
is charged with having violated is not subject to be  
annul later judicial notice of this, and must therefore  
preserve the correctness of the verdict. Albright case,  
above, and cases therein cited.

We are not of the opinion that is established  
reversible error for the court to correct this error  
of a matter for a new trial.

There being no substantial grounds for  
reversal, the judgment is affirmed.

APPROVED.

CITY OF CHICAGO,

Defendant in Error,

vs.

VICTOR BISSO,

Plaintiff in Error.

204 I.A. 163

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE MCGURELY  
DELIVERED THE OPINION OF THE COURT.

This is a companion case to the case of the same title, No. 22064, opinion in which is this day filed.

Here the defendant was charged with violation of section 1539 of the Municipal Code of Chicago, found guilty by a jury, and judgment entered on the verdict. What we said in the opinion in case No. 22064 is applicable to the instant case. The proceedings on the motion for change of venue have not been properly preserved for our review. The affidavits in support of the motion were made before the attorney in the case. The evidence is sufficient to sustain the complaint, although in the absence of the ordinance charged to be violated its sufficiency will be presumed.

There is no reversible error in the refusal of the court to allow further time for argument on the motion for a new trial.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

1011.1.103

Not found in text.

known to

unpublished work

on Chicago.

vs.

Not found in text.

RECEIVED THE OFFICE OF THE ATTORNEY GENERAL  
JANUARY 10, 1900

There is a comparison made in the case of the same

case, the record, which is also in this day filed.

There the defendant was charged with violation of

section 100 of the Municipal Code of Chicago, to wit: Publicly

by a jury, and judgment entered on the verdict. That the

case in the opinion is not the fact is applicable to the

instant case. The provisions of the law for change of

venue have not been properly preserved for our review. The

affidavits in support of the motion were made before the

entry in the book. The affidavit is entitled to sustain

the complaint, although in the opinion of the court the charges

to be violated the affidavits will be sustained.

There is no reversible error in the record as

the court is able further time for argument on the motion

for a new trial.

For the reasons indicated the judgment is

affirmed.

REVEREND.



CITY OF CHICAGO,  
Defendant in Error.

vs.

EMMA SIMONETTI,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 164

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Defendant was charged with keeping a dram shop and selling liquor in less quantities than a gallon, in violation of section 1539 of the Municipal Code of Chicago. A jury found her guilty and a judgment was entered fining her \$50.

Many things which we have said in the opinion in City v. Simonetti, No. 22600, opinion filed January 22, 1917, are applicable to the instant case. The proceedings upon the motion for a change of venue have not been properly preserved for our review in compliance with the statute requiring that this should be done by "a correct statement of such other proceedings in the case as such party may desire to have reviewed by the Appellate Court." Section 23 of the Municipal Court Act.

From the document filed, which is called a bill of exceptions, it appears that the notary public before whom the affidavits were sworn to was the attorney representing the defendant upon the trial. Such affidavits, as we have held in the Simonetti case, supra, should not be received by the court.

We are of the opinion that the testimony amply supported the verdict, and in any event we must presume its



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JAN 10 1950  
U.S. DEPT. OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D.C.

401. A. I. 108

THESE ARE THE RESULTS OF THE INVESTIGATION.

at 200.

A July Towns map policy and a judgment was entered finding a violation of section 1039 of the municipal code of Chicago. The finding was based on the fact that the property was used for a purpose other than that for which it was zoned.

Reference was made to the fact that the property was used for a purpose other than that for which it was zoned.

Many points which we have raised in the original  
in Life v. American, No. 1000, which was filed January 10,  
1917, are applicable to the present case. The proceedings  
against the action for a number of years have not been properly  
preserved for our review in compliance with the statute re-  
specting that class should be done by a correct statement  
of such exact proceedings in the case as then exists and  
before us have reviewed by the Appellate Court. Section

only in the discreetly case, which should not be treated  
in the same way.

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sufficiency in the absence from the record of the ordinance charged to be violated. See City v. Tearney, 187 Ill. App. 441, City v. Kohn, 195 Ill. App. 399, and other cases cited in the Simonetti case, supra.

We do not find that the record supports the claim that two cases were tried against the defendant by the same jury at the same time and the jury sworn only once, and defendant allowed only five peremptory challenges.

There does not appear to have been any reversible error, and the judgment is affirmed.

AFFIRMED.

entirety in the absence of the records of the original  
copies to be located. See City v. Lacey, 103 Ill. App.  
441, City v. Lacey, 103 Ill. App. 350, and other cases cited  
in the affidavit case. Wright.

It is not true that the record suggests the  
claim that two cases were tried against the defendant in  
the same jury at the same time and the jury sworn only once,  
and defendant allowed only five peremptory challenges.  
There does not appear to have been any reversal-

the error, and the judgment is affirmed.

WRIGHT.

127 - 22550

CHICAGO & RIVERDALE LUMBER  
COMPANY, a corporation,  
Defendant in Error.

vs.

EDWARD P. QUINLIVEN,  
Plaintiff in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 166

MR. PRESIDING JUSTICE MASURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff sold lumber to a general contractor named Hellinga, which was sued in remodeling a building belonging to the defendant, Quinliven, in accordance with a contract between Quinliven and Hellinga. Plaintiff, not being paid, brought suit against the contractor and owner jointly for the amount due it (section 28 Mechanics' Lien law, Hurd), and upon a directed verdict had judgment for \$370.07. Quinliven by order of severance prosecutes this writ of error alone.

It is presented by defendant as a defense that plaintiff has created an estoppel against its right to sue defendant because of an occurrence which defendant says was as follows: that he asked a man named Ahrends, in charge of sales and collections at a branch office of the plaintiff, for a bill for the lumber used in his building; that Ahrends said it would take a couple of days before the bill would be ready; that, defendant testifies, "I says to that, 'when I make the check out will I make it out to the Chicago and Riverdale Lumber Company or Mr. Hellinga,' and he told me to make the check out to Mr. Hellinga. He says, 'only one thing I ask you to do when you do make it out is to call this office



OFFICE OF THE ATTORNEY GENERAL  
 CHICAGO, ILLINOIS  
 DECEMBER 10, 1900  
 TO THE HONORABLE THE COMMISSIONER OF THE LAND OFFICE  
 CHICAGO, ILLINOIS  
 RE: THE LAND OFFICE  
 DEAR SIR:

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the above matter. The same has been referred to the proper authorities for their consideration. The result of their action will be communicated to you as soon as it is determined.

Very respectfully,  
 J. W. HARRIS, Attorney General



and let me know when you give it to him,' which I did." Ahrends denies that any of the above language in quotation marks was used. Subsequently plaintiff sent the bill to Hellinga, and within ten days of the delivery of the last material by plaintiff the defendant paid Hellinga an amount of money considerably in excess of what was due plaintiff, without taking any contractor's statement from Hellinga and without requesting from either Hellinga or the plaintiff a waiver of lien.

Even upon the questionable assumption that anything Ahrends might do in regard to waiving plaintiff's right to a lien could bind plaintiff or void its statutory remedy, the language ascribed to him by defendant is ineffective for such purpose. Defendant's contract with Hellinga covered both labor and material; plaintiff's account for lumber was with Hellinga; so that if Ahrends told defendant to pay Hellinga whatever might be due for lumber he only stated defendant's legal obligation under his contract, and this the defendant well knew. The element of fraud on the part of the plaintiff was wholly lacking, and if, as is claimed, there has been a fraudulent result, this may be more properly attributed to the conduct of the defendant, who knew, or in law was bound to know, that any payment made by him to Hellinga without taking a contractor's statement and after notice of plaintiff's claim, or within 60 days of the date when the material man's lien rights accrued, was in fraud of plaintiff's claim.

As nothing amounting to a waiver or abandonment of a lien has been shown, nor any conduct operating as an estoppel of plaintiff's right under the statute, the judgment is affirmed.

and let me know when you give it to him, which I will.  
 should be able to get the money in question  
 and the money. I have no doubt that the bill to  
 Kallman, and within ten days of the delivery of the same  
 material to Kallman, the Kallman bill should be paid.  
 to money would only be a matter of time and Kallman,  
 without having any concrete statement from Kallman and  
 also of something from other things or the plaintiff a  
 matter of time.

Very much the same thing should be said regarding  
 the other side in regard to getting plaintiff's bill to a  
 firm could find plaintiff or vice versa attorney ready, the  
 language would be that of the firm in that case for some  
 purpose. But what's the matter with Kallman's money both  
 sides and Kallman; Kallman's money is Kallman's and with  
 Kallman; as long as the money will be paid to pay Kallman  
 Kallman will be the firm and the firm should be Kallman's  
 legal obligation under the contract, and this is the contract  
 will know. The amount of time on the part of the plaintiff  
 and Kallman's bill, and it is the plaintiff, there has been a  
 transaction made, and it is the plaintiff's obligation to the  
 plaintiff of the Kallman, the bill, or the firm was to be to  
 Kallman, and any payment made by the firm to Kallman should be  
 a plaintiff's statement and after notice of Kallman's bill  
 or Kallman to the firm and the Kallman bill's bill  
 Kallman's bill, and in that of Kallman's bill.

It is Kallman's obligation to a matter of Kallman's bill  
 a firm and Kallman, and any payment made by the firm to Kallman  
 of Kallman's bill under the contract, the payment is

attested.

FREDERICK BAUSMAN, for the use of  
W. J. SELLECK and MARIA BORDEN,  
Executrix of the Estate of  
HAMILTON BORDEN, deceased,  
Appellee,

vs.

JOHN A. MEAD and CARL B. HINSMAN,  
Appellants.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

204 I.A. 167

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

On October 9, 1913, upon a consideration of the facts appearing upon a former trial of this case, an opinion was filed by one of the branches of this court adjudging that the judgment be reversed and the cause remanded - 182 Ill. App. 35, No. 18435. The case was redocketed in the Circuit Court; two other suits on the same cause of action had been brought, one in the name of Hamilton Borden and one in the name of William J. Selleck, and by agreement all three cases were consolidated under one case, which was submitted to the court for trial without a jury. After trial judgment was entered against defendants, assessing plaintiffs' damages in the sum of \$6,885, part for the use of Selleck and part for the use of Borden, executrix. By this present appeal defendants seek the reversal of this judgment.

In the prior opinion in this case will be found rather a full statement of the facts necessary to an understanding of the points in controversy. We here repeat that statement in part:

This is an appeal from a judgment against Carl B. Hinsman in an action of debt on a penal bond given by John A. Mead as principal, and Carl B. Hinsman as surety, to Frederick



RECEIVED BUREAU, THE THE ONE OF  
F. J. BELLER and HARRY BROWN,  
PROSECUTORS OF THE PEOPLE OF  
THE STATE OF NEW YORK,  
COUNTY OF SHERMAN, DECEASED,  
APPEALS.

VS.

JOHN A. BELLER and CARL A. BELLER,  
DEFENDANTS.

2011.1.15

IN SENATE, JANUARY 15, 1911.

REPORT OF THE ATTORNEY GENERAL.

On October 2, 1909, upon a consideration of the  
leave application upon a former trial of this case, an opinion  
was filed by one of the members of this court adjudging that  
the judgment be reversed and the case remanded - 1001 111.  
App. 20, 1001. The case was reheard in the Circuit  
Court; two other suits on the same cause of action had been  
dismissed, one in the name of Hamilton Brown and one in the  
name of William A. Bellier, and by agreement all three cases  
were consolidated under one case, which was submitted to the  
court for trial without a jury. After trial, judgment was re-  
versed against defendant, reversing plaintiff's damages in  
the sum of \$2,500, paid for the use of Bellier and paid for  
the use of Bellier, defendant. By this present appeal defendant  
asks that the reversal be affirmed.

It was first argued in this case with no issue  
whether a full statement of the facts necessary to be made  
standing of the parties in controversy. We have passed upon  
statement in part:

This is an appeal from a judgment rendered by the  
Circuit Court in an action of debt on a promissory note given by John A.  
Bellier to defendant, and Carl A. Bellier as surety, in the sum

Bausman as trustee in bankruptcy of the Alaska Smelting Company, in connection with the sale of a smelter belonging to the said bankrupt, made in pursuance of an order of the United States District Court for the Western District of Washington, in the matter of said Alaska Smelting Company, bankrupt, No. 3547.

The smelter, which was the only property of the bankrupt, was incumbered by a mortgage given to secure a bond issue of \$300,000. At or about the time the Smelter Company was adjudged bankrupt, which was in October, 1907, Bausman, the trustee in bankruptcy, and a Mr. Gould, the attorney for Mead, who was the owner of a large part of said bond issue, and a Mr. Blanc, representing a creditor who had advanced about \$50,000 to the bankrupt, met in New York City, and the statement was then made that the trust deed given to secure said bonds was invalid and that the bonds were invalid, and that this creditor represented by Mr. Blanc would insist upon proceedings being instituted to have said trust deed and bonds adjudged void. A short time thereafter Gould met Bausman in Seattle, Washington, and the trustee stated that he could not continue carrying the smelter, and that he would insist upon being given authority to sell it; that if Mead chose to bid upon the property, he would consent to an order that his bonds be allowed at 33-1/3 per cent of their face value as part of the purchase price, upon the assumption that said bonds were valid, provided Mead would give an indemnity bond in the sum of \$20,000, which it was thought would be sufficient to meet the claim of \$50,000 held by Mr. Blanc's client; so that if the proceeding to set aside the trust deed should be instituted and prevail, such creditor would be equal or superior in rank to Mead, and said indemnity



business as shown in ownership of the Alaska Building  
Company, in connection with the sale of a smaller building  
to the said company, made in testimony of the order of the  
United States District Court for the Western District of  
Washington, in the matter of said Alaska Building Company,  
Docket No. 3547.

The matter, which was the only property of the  
company, was transferred by a mortgage given to secure a  
loan of \$250,000. At or about the time the matter  
company was affected mortgage, which was in January, 1937,  
company, the transfer in bankruptcy, and a Mr. David, the  
attorney for said, and the order of a large part of  
said bank failed, and a Mr. Alano, representing a trustee of  
the estate about \$250,000 to the company, and in New York  
City, and the statement was then made that the bank  
given to secure said bonds was invalid and that the bonds  
were invalid, and that this matter represented by Mr. Alano  
would result upon successful claim liquidated to have said  
bank failed and hence adjusted valid. A short time thereafter  
would not remain in Seattle, Washington, and the matter  
stated that he would not continue carrying the matter, and  
that he would result upon being willing to sell it  
that it was agreed to his own property, he would continue  
as an officer and his name as officer of 22-1-1 was made of  
which from time to time at the company's place, upon the ex-  
ception that said bonds were valid, provided that said bank  
an immediately bond in the sum of \$250,000, which it was intended  
could be satisfied by the said bank or the said bank or the  
bank's agent; he said it was proposed to get some for  
these bonds should be liquidated and given, which resulted  
would be used by mortgage in time to said, and said bankruptcy

bond should be held for the common benefit of every legal creditor of the bankrupt.

Upon that statement and upon the entry of an order providing for the sale of the smelter, Gould stated that he would advise the giving of the bond conditioned to meet the claim of any lawful creditor, if that creditor should prove his equality or priority to Mead's claim. Accordingly an order of sale of said property was entered on March 21, 1908, directing the sale of the property, providing that the bidder whose bid should be accepted should pay all of the remainder of his bid above \$6,000 either in cash or in mortgage bonds at 33-1/3 per cent of their face value, and that if the successful bidder should tender such mortgage bonds in payment of the balance of the bid, in lieu of such cash, and his bid should be accepted, he should furnish security for the payment of creditors in the sum of \$20,000.

On April 7, 1908, the bid of Mead, for said property, of \$87,000, payable \$6,000 in cash and the balance by the surrender of mortgage bonds of the face value of \$243,000 was accepted, said bonds being received as part of said purchase price on the basis of 33-1/3 per cent of their face value, or \$81,000. The penal bond in the sum of \$20,000, as agreed upon, was executed and approved by the court, and a conveyance was thereupon made by the trustee to Mead of the said property, free and clear of said \$300,000 mortgage bonds.

The bond in question runs to Frederick Bausman, as trustee in bankruptcy of the Alaska Smelting Company, and after reciting the order authorizing the sale of the smelter, as aforesaid, and the bid of Mead and the acceptance thereof, concludes with the condition that -

Good should be held for the common benefit of every parcel  
creditor of the estate.

Upon that statement and upon the entry of an  
order providing for the sale of the estate, Good should have  
he would advise the giving of the bond conditioned in such the  
claim of any legal creditor, it shall creditor should have  
his equality or priority to Good's claim. Accordingly no pre-  
dict of sale of said property was entered on March 11, 1900.  
directing the sale of the property, providing that the bidder  
whose bid should be accepted should pay all of the remaining  
at his bid above \$2,000 either in cash or in mortgage bonds  
at 11-1/2 per cent of their face value, and that if the suc-  
cessful bidder should tender such mortgage bonds in payment  
of the balance of the bid, in lieu of cash, and his bid  
should be accepted, he should furnish security for the payment  
of creditors in the sum of \$20,000.

On April 7, 1900, the bid of Good, for said  
property, of \$27,000, payable \$2,000 in cash and the balance  
in the surrender of mortgage bonds of the face value of  
\$25,000 was accepted, said bonds were received in part of  
said purchase price on the basis of 11-1/2 per cent of their  
face value, or \$21,000. The cash bond in the sum of \$2,000,  
and entered upon, was accepted and approved by the court, and a  
certificate was introduced into the record to show that the  
said property, free and clear of said \$20,000 mortgage bonds,  
was sold in satisfaction of the claims of the creditors,  
and entered in possession of the estate of the estate, and  
after receiving the order authorizing the sale of the estate,  
as aforesaid, and the bid of Good was the successful bidder,  
conclusive upon the creditors.



"if the above bounden Mead shall pay, or cause to be paid, to any persons, firms or corporations that are now or hereafter shall become legal creditors of the bankrupt, Alaska Smelting Company, whatever pro rata sum may be adjudged to be due to them out of the proceeds of the sale of the bankrupt's smelter, to the same extent and with the same punctuality that the same would have been paid as a dividend to them or otherwise, by order of the court, out of the fund in court, had the purchase price been paid in cash, instead of in mortgage bonds (provided, however, that all persons who may hereafter seek to avail themselves, or cause the trustee to avail himself on their behalf, of any liability in their favor or that of the trustee by reason of this obligation, shall cause to be instituted in cause number 3547 the question of any equality or priority upon their part over or with the mortgage bonds aforesaid as creditors of the bankrupt, on or before the 21st day of January, 1909), this obligation shall be null and void; otherwise to remain in full force and effect."

The breach of said obligation assigned in the declaration was that one Hamilton Borden was a person who was a legal creditor of the said bankrupt, and that he caused to be instituted in cause No. 3547 the question of equality and priority on his part, over or with the mortgage bonds in said writing mentioned, as a creditor of said bankrupt, and that thereafter, on January 3, 1910, it was determined and adjudged that he was the owner and holder of seven coupon bonds of the same series as that mentioned in said writing and secured by the same mortgage; that on January 20, 1909, Borden filed his petition, together with his proof of debt on said bonds, seeking to avail himself, and seeking to cause the trustee to avail himself on behalf of said Borden, of the liability in favor of said Borden by reason of said writing obligatory, and instituted in said cause the question of equality on the part of said Borden with the \$243,000 mortgage bonds surrendered by said Mead to the trustee aforesaid, and that a copy of said order duly certified by the clerk of said court was sent by mail by said clerk to said trustee and to the attorney for John A. Mead, and to Mead personally, and to said Carl B.





Hinsman, and that it was by said court on January 3, 1910, determined that Borden was a creditor of said bankrupt in the sum evidenced by seven coupon bonds of \$1,000 each, dated October 1, 1903, with interest at six per cent per annum, and was, as such creditor, of the same rank as said Mead, and that said Borden was entitled to receive his pro rata share of the purchase price of said property to the same extent and with the same punctuality as if said purchase price of \$87,000 had been paid in cash, and that said Borden has not received his pro rata share of said purchase price of said property, or any portion thereof, or any other sum or sums, as dividends, or otherwise, in said cause.

The same averments are made with respect to William J. Selleck, with a like finding that he was the owner and holder of ten coupon bonds of \$1,000 each, and that he also was entitled to receive his pro rata share of the purchase price of said property, and that he had not received such share.

The action is in the name of Bausman, as trustee, for the sole benefit of Borden and Selleck, none of the other bondholders and no unsecured creditors appearing to claim any rights under said bond.

The defendant, Hinsman, only was served, who filed pleas to the declaration, setting up, first, that prior to the commencement of this suit the estate of said bankrupt was settled and plaintiff discharged as such trustee. This plea was denied by plaintiff by replication, and issue was joined thereon. A second plea averred that said Borden and Selleck were not at the time said bond was executed, and did not thereafter at any time prior to the commencement of this suit become legal creditors of said bankrupt, and issue was joined on this plea.



The evidence introduced by the plaintiff consisted of an exemplified copy of the bond sued on, and exemplified copies of two orders of the United States District Court of Washington in re Alaska Smelting Company, bankrupt, entered upon the petitions of said Borden and Selleck, respectively, purporting to find that said Borden and Selleck were holders and owners, one of seven and the other of ten bonds of \$1,000 each of said bankrupt, part of the aforesaid total issue of \$300,000. Said orders, after reciting the sale to Mead and the transfer to him of the property of the bankrupt, further found that said Borden and Selleck have been creditors of the bankrupt and are entitled to receive their pro rata share of the purchase price of said property to the same extent and with the same punctuality as if said purchase price of \$87,000 had been paid wholly in cash, instead of \$81,000 thereof having been paid in mortgage bonds.

Neither Mead nor Hinman appeared or took any part in the proceeding in which these orders were entered.

Additional evidence adduced upon the second trial was in part as follows: exemplified copies of the petitions of Selleck and Borden, respectively, concerning their mortgage bonds; one of each of said mortgage bonds held by Selleck and Borden, respectively, showing on their face that the same were part of the same issue of bonds as those surrendered by Mead in part payment of his bid for the smelter; the order of the United States District Court of Washington authorizing the sale by the trustee of the smelter and prescribing the terms and conditions thereof; the bond upon which this action is based; Mead's bid for the smelter and an order accepting the same and confirming the sale, and a deed of conveyance from the trustee to Mead; also depositions tending to





show that no other bondholders than Mr. Borden, Mr. Selleck and Mr. Mead petitioned for an adjudication of their bonds within the time allowed by the terms of the indemnity bond given by Mead, and that no other than these three sought to file any claims of any kind in the United States District Court in said cause. There is no evidence of any order of the bankruptcy court fixing a rate of distribution of the proceeds of sale, although in the prior opinion of this court it was held that the rate of distribution should be fixed by a proper adjudication in the bankruptcy court.

However, we shall not discuss the controverted question concerning the sufficiency of the evidence presented upon the second trial to cure the omission found in the former opinion, for the reason that a more substantial and fundamental consideration leads us to conclude that the plaintiff or plaintiffs have no right of action upon the bond in question. This conclusion is based upon our construction of the bond, apart from any parol testimony, a construction which in the opinion of the writer of the former opinion should have controlled the judgment upon that appeal.

We hold that this Mead bond was not given for the protection of creditors of the same class as Mead, that is, the holders of mortgage bonds. Giving the bond an interpretation consonant with the circumstances and consistent with its language, it means that Mead was obligated thereby to pay whatever pro rata sum might be adjudicated due creditors, not holding mortgage bonds, who should, prior to January 21, 1909, in case No. 3547, successfully challenge the priority or equality of creditors holding mortgage bonds. The mortgage bonds were a first lien upon the property, and they were all



...that no other consideration than the fact that the  
...was not intended for an acquisition of their business  
...within the time allowed by the terms of the promissory note  
...given by them, and that no other facts were shown  
...to the contrary of any kind in the evidence submitted  
...Court in this case. There is no evidence of any order of  
...the bankruptcy court making a sale of division of the  
...property of the estate, although in the order of the court  
...it was held that the sale of division should be made by  
...a proper adjunction in the bankruptcy court.

...however, we shall not discuss the controverted  
...question concerning the validity of the evidence pre-  
...sented upon the second trial to cure the omission found in  
...the former opinion, for the reason that a more substantial  
...and fundamental question leads us to conclude that the  
...plaintiff or plaintiff have no right of action upon the  
...bond in question. This conclusion is based upon our con-  
...sideration of the facts, apart from any legal question, a  
...consideration which in the opinion of the writer of the  
...former opinion should have controlled the judgment upon  
...that appeal.

...we hold that this bond was not given for  
...the protection of creditors of the same class as bond, that  
...is, the holder of mortgage bonds. Giving the bond as in-  
...terest in accordance with the circumstances and consistent  
...with its language, it means that bond was delivered to the  
...payee as a security for the payment of the mortgage bonds, and  
...not as a security for the payment of the mortgage bonds, as  
...1909, in case No. 1247, necessarily involves the principle  
...of equality of mortgage holders mortgage bonds. The mortgage  
...bonds were a first lien upon the property, and bond was all

upon the same plane of equality. Any proceeding to give any set or holdings of these bonds priority over any others would be useless, and any suggestion to this end would be senseless. The provisions of the Mead bond contemplating an adjudication of the priority of liens cannot refer to any liens about which there was no question, and must refer to that which might be in question, namely, the order of liens, on the one hand, of all creditors holding mortgage bonds, as against, on the other hand, the order of liens of other creditors. It follows, therefore, that Borden and Selleck, as holders of mortgage bonds, are not within the class of persons entitled to be benefited by the Mead bond, and hence have no right of action thereon.

In this view of the case it is unnecessary to discuss other points presented by counsel; our construction of the bond disposes of all other questions in controversy.

For the reasons above indicated the judgment is reversed and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT HERE.

upon the same plane of equality. And proceeding to give any  
 set or hierarchy of these needs priority over others would  
 be useless, and any suggestion to this end would be sense-  
 less. The distinction of the two bands and the distinction in the  
 allocation of the priority of these needs refer to the same  
 point which there can be no question, and what refers to the  
 which should be in question, namely, the order of them, on  
 the one hand, of all creditors holding corporate bonds, as  
 against, on the other hand, the order of them of other  
 creditors. It follows, therefore, that bonds and claims,  
 as matters of mortgage bonds, are not within the class of  
 persons entitled to be benefited by the bond fund, and hence  
 have no right of action thereon.

In this view of the case it is unnecessary to  
 discuss other points presented by counsel; our construction  
 of the bond fund of all other questions in controversy.  
 For the reasons above indicated the judgment is  
 reversed and judgment of all parties is entered in this court.  
 REVEREND AND HONORABLE JUDGE.

NATHAN WOLF and MORRIS CHOYNSKI,  
Appellees,

vs.

THE SELIG POLYSCOPE CO., a cor-  
poration, GEORGE KLEINE, ESSANAY  
FILM MANUFACTURING CO., a corp.,  
Appellants.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

204 I.A. 178

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek the reversal of a judgment against them in the sum of \$2,000 had by plaintiffs in an action on the case charging conspiracy to injure the business of plaintiffs, with resulting damages.

The evidence shows that the defendants are motion picture film manufacturers or producers; that motion picture producers in the United States generally print and distribute in connection with their business what is known as a "poster," which is a colored lithograph of scenes from the films; these posters are sold to the motion picture theatre proprietors exhibiting the pictures in their theatres and who exhibit the posters in front of their theatres as a kind of advertisement to attract patrons.

It is shown that the plaintiffs had for a number of years been engaged in the exhibition business and also the business of buying and selling the motion picture posters. An association of the theatre proprietors was formed, of which plaintiffs were members. This association became dissatisfied with the way the motion picture posters were being sold and distributed by the manufacturers, and plaintiffs desired to enter into this business of buying and selling posters for the purpose of giving the association of exhibitors







better service. Some time in November, 1912, the plaintiffs called upon a Mr. Day, connected with the defendant Essanay Film Company; plaintiffs had been in various moving picture dealings with Mr. Day prior to that time. Plaintiffs stated that they wanted to get a price on posters, and were informed by Mr. Day that he could supply them with posters and that plaintiffs might put in an order for same. Plaintiffs then called at the office of the defendant Kleine, and there talked to a Mr. McCarahan, who offered to sell them posters at eight cents each. They then went to the defendant Selig's place of business and told Mr. Selig that they wanted to see about posters, and were told that they probably could be supplied. Plaintiffs say that they then went to an office and installed some furniture, and then made a second trip around to each of the defendants and ordered posters, but that defendants without any explanation refused to deliver them.

Plaintiffs testified that on this second interview each of the defendants informed them that they could only secure posters in the event that the other two defendants would supply plaintiffs with posters. There is also evidence tending to show that plaintiffs could not procure these posters at a wholesale price from any other persons except the defendants.

The testimony of plaintiffs in essential particulars is denied by the defendants. Mr. Day of the Essanay Company testified that the plaintiffs did not order any lithographs at any time; that he did not refuse to sell them, but told them that his company was not engaged in the business of retailing posters, but that they could get all they wished from a Mr. Van Ronkle who exclusively sold Essanay posters in Chicago, and that he never told them that the

Police service. Some time in November, 1911, the Plaintiff called upon a Mr. [redacted], connected with the defendant company. This [redacted]; Plaintiff had been in various other places. Plaintiff stated that they wanted to get a wire or postcard, and were informed

by Mr. [redacted] that he would supply them with postcards and that Plaintiff might get in an order for same. Plaintiff then

called at the office of the defendant company, and there talked to Mr. [redacted], who offered to sell them postcards of about cents each. They then went to the defendant

lit's place of business and told Mr. [redacted] that they wanted to see some postcards, and were told that they probably would be supplied. Plaintiff's say that they then went to an of-

fice and inspected some furniture, and then made a second trip around to each of the defendant's and viewed postcards. Plaintiff's without any explanation refused to de-

liver them.

Plaintiff testified that on this second inter-view with the defendant's Plaintiff learned that they could only receive postcards in the event that the other two women knew would supply Plaintiff with postcards. There is also evidence tending to show that Plaintiff could not procure these postcards at a wholesale price from any other person except the defendant's.

The testimony of Plaintiff is essential to-

Plaintiff is based on the testimony. It says of the

Plaintiff testified that the Plaintiff did not order any

Plaintiff at any time; that he did not refuse to sell them.

but said that his company was not wanted in the

case of collecting postcards, and that they could get all that

wanted from Mr. [redacted] who exclusively sold

postcards in [redacted], and that he never sold them

Hessanay Company would not sell posters because the other two defendants would not sell them, and that nothing of the kind was ever mentioned.

It seems to be undisputed that plaintiffs knew that all the posters manufactured by the defendants were sold in Chicago by Mr. Van Ronkle. One of the plaintiffs had at one time been engaged in business with Van Ronkle, and testified that he usually got all the posters he wanted from him. Van Ronkle also testified that he knew both plaintiffs for a number of years, that Wolf had been associated with him, and that plaintiffs had bought posters of the defendants from him, as he had all of them for sale and never refused to sell posters to any one. Selig says that plaintiffs called on him and that he told them he thought he could supply their demand; that on their second visit they talked again about buying posters and he requested that they submit a written order as to what they wanted; that afterwards, in the latter part of December, they wrote a letter to which the defendant Selig replied inviting plaintiffs to submit a proposition informing him just what they were going to do with the posters and how many they wanted, and that if this was satisfactory the defendant Selig would be pleased to do business with them; that no reply was made by plaintiffs to this letter.

Mr. McCarshan, acting for the defendant Kleine, says that plaintiffs came to his office saying that they represented the motion pictures exhibitors league, who were dissatisfied with the way the poster business was being run in Chicago, and that plaintiffs wanted to engage in that business; that they inquired in general about the number of posters Kleine had on hand and could supply, but that nothing definite was said as to any orders; that he never told them



business company would not sell papers because the other two  
 defendants would not sell them, and that making of the kind  
 was not medicinal.

It seems to be understood that plaintiff's name

that all the papers were taken as the defendants were said  
 in Chicago by Mr. Van Hook. One of the plaintiff's was at  
 one time been engaged in business with Van Hook, and has

advised that he was not for all the papers he wanted from  
 him. The plaintiff also testified that he knew both plaintiff's  
 for a number of years, that he had been associated with him  
 and that plaintiff had bought papers of the defendant from  
 him, and he had all of them for sale and never refused to sell  
 papers to any one, being aware that plaintiff relied on him  
 and that he told them he thought he could easily make demand;

that on their second visit they talked about buying  
 papers and he requested that they submit a written order or  
 to that they wanted; that afterwards, in the latter part of  
 December, they wrote a letter to him the defendant asking  
 for the plaintiff's name to submit a proposition involving  
 him that they were going to do with two papers and how  
 many they wanted, and that it was satisfactory to him  
 because being would be pleased to do business with them;  
 that on being told by plaintiff to this effect:

Mr. Houghton, acting for the defendant James,

says that plaintiff came to his office saying that they had  
 received the action against defendant James, and were dis-  
 satisfied with the way the paper business was being run in  
 Chicago, and that plaintiff wanted to arrange to take out  
 (next) that they required in general about the number of paper  
 was James and he had and could supply, but that plaintiff  
 plaintiff was told he was not satisfied; that he never told them

that Kleine would not sell them posters. There was no evidence that there was any conversation or talk between the defendants showing any agreement between them not to sell posters to the plaintiffs.

The gist of this action is a joint conspiracy to violate the contracts entered into severally by the defendants with the plaintiffs. It therefore was essential to plaintiff's case that they establish the several contracts with the defendants. We are of the opinion that they have failed in this respect. Taking their own statements in the most favorable light to them, there has been shown nothing more than preliminary negotiations which might or might not ultimately have resulted in contracts. At most what was said by the defendants merely amounted to an offer that if plaintiffs should wish to purchase posters and should make a proposition which was satisfactory to the defendants they might do business together. In the case of the Essanay plaintiffs were told that this company was not engaged in the business of retailing posters and were referred to Van Honkle who handled all the posters made by that defendant. In not a single instance can it be said that the conversations between the plaintiffs and the defendants respectively amounted to a contract. A contract to be enforceable must be definite as to amount, the price, terms of payment and time of delivery. These elements are not determined by the loose, informal talk of the parties.

Plaintiffs having failed to prove the contracts which it is alleged defendants conspired to break, their case fails, and the judgment will be reversed with a finding of facts and judgment of nil capiat will be entered in this court.

REVERSED WITH FINDING OF FACTS.





FINDING OF FACTS.

The court finds that no contracts were entered into between the plaintiffs and the defendants, respectively, which defendants conspired to break, as alleged in plaintiffs' declaration.

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The other finds that in November 1950, the  
into Western the plasticity and the plasticity, 100-10000.  
which elements contained in the, as shown in the  
100-10000.

ELLEN BARRETT, Admx. Estate of  
Thomas E. Barrett, Deceased,  
Plaintiff in Error,

} Error to

vs.

} County Court,

ANNIE MARSCHAK, Admx. Estate of  
Joseph Marschak, Deceased,  
Defendant in Error.

} Cook County.

MR. PRESIDING JUSTICE MESURELY  
DELIVERED THE OPINION OF THE COURT.

By this writ of error is brought in review the record in an action upon a replevin bond in which judgment was entered against the plaintiff. Phases of this case have been before this court several times. See 154 Ill. App. 637; 171 App. 601, and 192 App. 481. Upon the appeal where the opinion appears in the last citation, Mr. Presiding Justice Baume in an extended opinion narrated all the important facts, and we shall not repeat these. By that opinion it appears that because of improper rulings on the competency of evidence the judgment was reversed and the cause remanded. After the cause was remanded to the County Court the defendant filed a plea, called an amended 4th plea, all the other pleas having previously been withdrawn, setting up as a bar to the proceeding a judgment in the Municipal Court adverse to the plaintiff in that case, who was Strassheim, the successor to Sheriff Barrett, which was affirmed by the Appellate Court, volume 171, supra. Plaintiff filed replications to this plea, the first of which set up the fact that Strassheim had no title and had no right of action, and that the plaintiff, Ellen Barrett, administratrix, was not a party to that suit and therefore ought not to be bound thereby. To this replication



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2.

a demurrer was filed. Plaintiff moved that the demurrer be carried back to the plea and sustained, which motion was denied.

We are of the opinion that the court was in error in so ruling. In the opinion in this case by Mr. Justice Baume the effect of this prior proceeding and judgment was passed upon, the court saying: "The right of action upon the replevin bond in question given to Thomas E. Barrett, Sheriff of Cook County, was on the death of said Thomas E. Barrett, vested in his administratrix and not in his successor, Christopher Strassheim. Schott v. Youres, 142 Ill. 253." And further, after discussion of the proposition as to whether or not the judgment in the Strassheim suit was an adjudication in the instant suit, the court concludes that "said judgment would not operate to bar the present suit." This settles the law of this case, and even if we were not in accord with the conclusion therein reached we would be bound to follow it, and the trial court was in error in not doing so. We might also add that we are in thorough accord with the conclusion stated in Judge Baume's opinion. In this situation the trial court should have held that the plea of res judicata was ineffective and demurrable.

We think there is no merit in the contention that when the court sustained the demurrer to the replication and plaintiff went to trial on the issues made by the other replications there was a waiver of the effect of the order of the court denying the motion to carry the demurrer back to the plea. We are cited to no cases so holding, and can see no reason why this should be the rule. The effect where the motion to carry





3.

a demurrer to a replication back to a plea is overruled and the parties proceed to trial, is stated in Bennett v. Union Central Life Ins. Co., 203 Ill. 439, which holds that where a demurrer to a plea is sustained and the pleader does not ask leave to amend his plea he will be held to abide by or "stand by" his plea, and may be heard to urge in a court of review that his plea was good in law and that it was error to hold it insufficient on demurrer.

For the reason that the trial court was in error in not following the law of the case as fixed in the prior decision of this court, the judgment is reversed and the cause is remanded to the County Court with directions to overrule the demurrer to the first replication and to carry said demurrer back to the 4th amended plea and sustain the demurrer to said plea.

REVERSED AND REMANDED  
WITH DIRECTIONS.



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 the parties proceed to trial, it ended in George's trial  
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For the reason that the trial was in view in  
 not following the law of the case as cited in the trial be-  
 taken at this court, the judgment is reversed and the case  
 is remanded to the County Court with directions to overrule  
 the verdict to the first judgment and to deny said  
 judgment back to the 1st meeting place and award the hammer  
 to said glass.

REVEREND THE HONORABLE  
 THE JUDGE.

CHICAGO SAVINGS BANK & TRUST  
COMPANY and LUCIUS TETER,  
Plaintiffs in Error,

vs.

MARY J. DUNN and WILLIAM H.  
DUNN,  
Defendants in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

204 I.A. 181

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error petitioned in a foreclosure proceeding for a writ of assistance, but this was denied as to defendant in error Mary J. Dunn. The propriety of this order is challenged by this writ of error.

The Chicago Savings Bank & Trust Company on October 30, 1913, filed a bill to foreclose a purchase money mortgage given by Lyda Champlin to secure \$2,500 of the purchase money for real estate bought from Teter for \$2,900, the deed to her being recorded on June 27, 1913. Lyda Champlin conveyed the premises to William H. Dunn by deed dated July 5, 1913, and thereupon William H. Dunn moved onto the premises and has resided there with his family continuously since that date. The bill to foreclose made Lyda Champlin a party defendant, and also William H. Dunn, but did not make his wife, Mary J. Dunn, a defendant. The foreclosure proceedings went to a decree of sale, and on July 3, 1914, the premises were sold to Lucius Teter, who received a deed therefor upon the expiration of the period of redemption. The decree provided for letting the purchaser into possession and that a writ of assistance should issue. Afterwards demand for possession was made upon both

CHICAGO SAVINGS BANK & TRUST  
CORPORATION, INC.  
PLAINTIFFS IN REPLY,

vs.

WILLIAM J. WOOD and WILLIAM H.  
WOOD,  
Defendants in Reply.

1811 A. 181

W. J. WOOD and WILLIAM H. WOOD,

Defendants in Reply to the Court.

Plaintiffs in their petition in a foreclosure  
proceeding for a writ of foreclosure, but this was denied  
as to defendant in answer entry 1. The property of  
this estate is challenged by this writ of entry.

The Chicago Savings Bank & Trust Company, an  
incorporated company, filed a bill in foreclosure a mortgage money  
writ given by Lyda Campbell to secure \$2,000 of the  
purchase money for real estate bought from John J. Wood,  
the date to have being recorded on June 27, 1911. Lyda  
Campbell conveyed the premises to William H. Wood by deed  
dated July 3, 1911, and charged William H. Wood owed entry  
the premises and has resided there with his family continuously  
since that date. The bill in foreclosure made Lyda Campbell  
a party defendant, and also William H. Wood, but did not  
make his wife, Mary J. Wood, a defendant. The foreclosure  
proceedings went to a decree of sale, and on July 2, 1912,  
the premises were sold to Louise Foster, who received a  
deed therefor upon the expiration of the period of redemption.  
The decree provided for setting the purchaser into  
possession and that a writ of execution should issue.  
Afterwards demand for possession was made upon Lyda



William H. Dunn and Mary J. Dunn, an earlier demand on William H. Dunn alone having been refused as he claimed that his wife, Mary J. Dunn, was the owner of the premises. Between the date of the service of this demand and notice and the date designated in such notice for the presentation of petition for a writ of assistance to the court, two deeds were filed for record on March 20, 1916, one from Lyda Champlin to William H. Dunn, and the other from William H. Dunn to Mary J. Dunn, dated July 8, 1913. Upon these matters being presented by petition, the court was apparently of the opinion that the writ of assistance should not issue against Mary J. Dunn for the reason that she had not been made a party defendant in the foreclosure proceeding, and that being in possession she was a necessary and indispensable party.

In so holding the court was in error. Dower cannot be asserted against a purchase money mortgage; the wife of the owner of the equity of redemption is neither a necessary nor a proper party to proceedings to foreclose a mortgage of that kind. In Baker v. Scott, 62 Ill. 86, it was held under similar circumstances that not only was the wife an improper party in a foreclosure bill but that a demurrer on this ground should have been sustained. Among many other cases announcing the same rule are Short v. Haub, 81 Ill. 509; Lohmeyer v. Durbin, 206 Ill. 574; Harrow v. Grogan, 219 Ill. 288; Stephens v. Bicknell, 27 Ill. 444.

Neither can it be said that Mary J. Dunn had a homestead in the property and should have been made a party. She did not have the homestead, as this was vested solely in the husband during his lifetime and while he continuously resided with his family. While the wife has the right of occupancy with the children, yet during the lifetime of the





husband and during the time he continues to reside with them, her rights are merely contingent, somewhat like the inchoate right of dower. Taylor v. Taylor, 223 Ill. 423.

Even if Mary J. Dunn had an estate of homestead this could not be asserted against a purchase money mortgage. Stafford v. Woods, 144 Ill. 203.

We are also inclined to agree with the contention that the deed from William M. Dunn to his wife, Mary, conveyed nothing. It is admitted that the property was of the value of \$2,900; the purchase money mortgage being for \$2,500 left an equity of \$400. That brings it precisely within the rule stated in Roberson v. Tippie, 209 Ill. 38, where it was held that "a conveyance of the homestead not exceeding in value \$1,000 by a householder to his wife, she not joining therein and acknowledging the same as required by the statute, is absolutely void and passes no title whatever."

Plaintiffs in error were clearly entitled to the writ of assistance against Mary J. Dunn, and the order of the Circuit Court denying this is reversed and the cause is remanded with directions to issue a writ of assistance against Mary J. Dunn as well as against William M. Dunn.

REVERSED AND REMANDED WITH DIRECTIONS.

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E. J. JOHNSON,  
Defendant in Error,

vs.

ADOLPH W. WALDMAN,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 190

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

E. J. Johnson brought an attachment suit in the Municipal Court of Chicago against the defendant, Adolph W. Waldman. Judgment was entered in that court in favor of the plaintiff, and the defendant brings the case here by writ of error for review.

Rule 18 of the rules of this court requires that in all cases the party bringing the cause into this court shall furnish a complete abstract of the record made in the trial court. What purports to be an abstract of the record filed in this court by the defendant is as follows:

"Rec.  
Page

- 1 Placita.
- 3 Affidavit for attachment.
- 5 Attachment bond.
- 7 Attachment writ.
- 8 Appearance of Adolph W. Waldman and Mary Waldman.
- 9 Order for leave to file amended bond.
- 10 Order extending defendant's time to file traverse.
- 11 New attachment bond.
- 13 Order quashing attachment writ and dismissing suit against all defendants, except Adolph W. Waldman.
- 14 Order for leave to file count in trover.
- 16 Amended statement of claim.
- 18 Affidavit of merits.
- 19 Order dismissing suit for want of prosecution.
- 20 Order reinstating case.
- 21 Order continuing case.
- 22 Finding for plaintiff in trover, and exception.
- 23 Motion defendant new trial, overruled and exception. Motion in arrest of judgment, overruled and exception. Judgment on finding for plaintiff, and exception.
- 24 Order extending time to file bill of exceptions. Order approving stay bond.
- 26 Stay of execution bond.
- 27 Order approving stenographic report.
- 28 Stenographic report filed."





This is a mere index and not an abstract of the record.

We are inclined to the view that, in any event, the judgment of the Municipal Court was proper; but even if this were not so, this judgment would have to be affirmed because of the failure of the defendant to comply with the rules of this court in the preparation of the abstract.

AFFIRMED.

This is a more index and not as extensive as

the records.

It was looked at the view that, in any event,

the judgment of the National Court was proper; but even

if this were not so, this judgment would have to be set

aside because of the failure of the witnesses to comply

with the rules of this court in the presentation of the

evidence.

REMARKS.

The court is of the opinion that the evidence is not sufficient to sustain the judgment of the National Court. The witnesses failed to comply with the rules of this court in the presentation of the evidence. The judgment of the National Court is set aside.

The court is of the opinion that the evidence is not sufficient to sustain the judgment of the National Court. The witnesses failed to comply with the rules of this court in the presentation of the evidence. The judgment of the National Court is set aside.

BENJAMIN MOORE & COMPANY,  
a corporation,  
Plaintiff in Error,

vs.

JOHN W. CLARK,  
Defendant in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 191

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a judgment of the Municipal Court. The subject matter in this suit was adjudicated in an attachment suit, No. 525520, in the Municipal Court. The plaintiff here was an intervening petitioner in that proceeding, and it obtained a judgment in its favor for the sum of \$417.65. The only question presented to this court is whether the abbreviated form of the judgment in the attachment suit is such a valid judgment of the Municipal Court as that it can be said to be res judicata of the rights of the plaintiff in this suit.

The record discloses that title to the subject matter of this suit was an issue in the attachment proceeding in the Municipal Court, in which the plaintiff in error on its own motion intervened; that it obtained a judgment in its favor; that the defendant was in said proceeding ordered to pay plaintiff the sum of \$417.65 of moneys then in the possession of the defendant; and that this sum was paid by the defendant to the plaintiff and was accepted by it.

It is held in Hunter v. Empire Surety Co., 191 Ill. App. 634, that an entry of an abbreviated form of judgment was not the formal record of a judgment; that it was, however, a sufficient minute of the proceedings to enable



TO THE COURT  
BY COUNSEL

DEFENDANT'S MOTION TO  
DISMISS  
AND  
MOTION TO  
SUSTAIN  
THE  
OBJECTION TO THE  
ADMISSION OF THE  
EVIDENCE

2011.11.11

THE COURT SHALL DELIVER THE VERDICT OF THE CASE.

This is a case of error to review a judgment of the Municipal Court. The subject matter in this case was adjudicated in an agreement with the defendant, in the Municipal Court. The plaintiff has an intervening petition in that proceeding, and it obtained a judgment in its favor for the sum of \$17.65. The only question presented to this court is whether the intervenor's form of the judgment in the agreement with the defendant is such a valid judgment of the Municipal Court so that it can be said to be the judgment of the court of the plaintiff in this case.

The second judgment that is in the agreement with the defendant is also in the agreement proceeding in the Municipal Court. In which the plaintiff is error on the one motion intervened; that it obtained a judgment in its favor; that the defendant was in said proceeding ordered to pay plaintiff the sum of \$17.65 of money then in the possession of the defendant; and that said sum was paid to the defendant to the plaintiff and was assigned by

16.

It is said in Wright v. Wright, 101 Ill. 107, 108, that an entry of an adjudicated form of judgment was not the formal record of a judgment; that it was, however, a sufficient basis of the proceedings to enable

the clerk to properly enter the judgment in the case.

In Abramovitz v. Longknecht, 195 Ill. App. 484, referring to an invalid record of a judgment, the court said, "it is within the right and power of the appellant to have a valid record of the judgment entered. The judgment of the court in that case is not invalid, even though the record of the same, as it now stands, is."

A judgment in an attachment suit which adjudicates the right of all parties properly before the court, either by intervening petition or by valid service of process, is binding upon all such parties, and such adjudication is res judicata of their rights in the subject matter of the suit. The plaintiff has treated this judgment, which it now claims is invalid, as a valid judgment, and it has accepted the sum found due it in the attachment proceedings; it can not in this suit be permitted to say that the judgment in its favor was illegal. Had it been dissatisfied with the judgment of the Municipal Court in the attachment suit it could have prosecuted an appeal or writ of error to this court; by its failure to have done so it must be held to have elected to abide by the judgment in that case.

There is no merit in the claim that the clerk's entry of the judgment in the attachment suit was not in the English language and that it should have been ruled out by the trial judge in this suit. An examination of that part of the entry of the judgment referring to the adjudication of the issue arising under plaintiff's intervening petition reveals that while certain words in the order are abbreviated, still the order is in such form that it is not at all difficult to determine its definite meaning. That part of the

the same to properly enter the judgment in the case.

In Whitcomb v. Whitcomb, 188 Ill. 414, 415, 416,

referring to an invalid record of a judgment, the court said,

"It is within the right and power of the court to have a

valid record of the judgment entered. The judgment of the

court in that case is not invalid, even though the record

of the case, as it now stands, is."

A judgment is an agreement with which the parties

enter the trial of all parties proper before the court,

either by agreement or by the court's decision in the case.

In Whitcomb v. Whitcomb, 188 Ill. 414, 415, 416, the court said,

"The judgment of the court is the judgment of the court."

The judgment is the judgment of the court, and it is not

invalid because it is not a judgment of the court.

The court found that it is the attorney's responsibility; it is

not in this case to be satisfied to say that the judgment is

the court's and it is not the court's responsibility.

Judgment of the court is the judgment of the court.

There is no question as to the right of the court to enter

judgment; it is the court's duty to enter judgment.

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judgment; it is the court's duty to enter judgment.

There is no question as to the right of the court to enter

order of judgment referred to is as follows;

"and for interv claim as to four hundred seventeen 65/100  
dols (\$417.65) of funds in hands of Garn. Judg on findg on  
claim of interv claim of Benjamin Moore & Co. partly for  
plff and partly for interv claim as per finding N. C. No."

Plaintiff does not deny that it received of defendant the  
\$417.65 awarded it in the attachment suit. We are of the  
opinion that the judgment in such suit was and is res  
judicata of the rights of the plaintiff to the moneys in  
the possession of the defendant.

The judgment of the Municipal Court will be  
affirmed.

AFFIRMED.



Order of documents referred to is as follows:

1. The first claim is for a method of determining the position of a point in a plane, which consists in measuring the distances from the point to three fixed points in the plane, and then determining the position of the point by the intersection of three circles, each having one of the fixed points as its center and the measured distance as its radius.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 03-09-2001 BY 60322 UCBAW

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10. *Chlorophyll a* (mg/g dry weight) =  $\frac{12.7}{2300} \times \text{Absorbance at } 663 \text{ nm}$

[illegible]

and the 77th Legislature and the Governor will

1. 2004.12.25

A. M. CHESBROUGH,  
Defendant in Error,

vs.

JACOB LANSKI,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 192

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to reverse a judgment of that court in favor of plaintiff, A. M. Chesbrough, and against defendant, Jacob Lanski, for the sum of \$190.

The controversy arose over a contract, evidenced by certain correspondence between the parties. On August 19, 1915, the plaintiff by letter requested the defendant to quote him a price on scrap iron. On August 21, 1915, in answer to this letter, defendant offered to purchase of plaintiff scrap iron of the kind referred to in plaintiff's letter of August 19th, at \$8.00 per gross ton f o b cars Thompson, Mich." On August 23, 1915, plaintiff wrote defendant in part as follows:

"As soon as we can get around to it I think we will be able to load out about four carloads. Some of this scrap is old saw mill machinery in quite large pieces. Can these be put in the same as smaller scrap? It would of course have to be broken up before being put to use."

On August 25, 1915, in answer to this defendant wrote, "it will be satisfactory that you ship all the scrap iron you have \* \* \* at the price quoted you of \$8.00 per gross ton." On receipt of the letter of August 25th plaintiff shipped one carload, 23 3/4 tons, of scrap iron to the defendant.

On October 8, 1915, defendant wrote plaintiff to "do whatever possible to hurry forward the rest of the

UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D. C.

A. E. LAMARCA,  
Defendant in Error,  
vs.  
JACK LAMARCA,  
Plaintiff in Error.

2017.1.13

THE UNITED STATES DEPARTMENT OF JUSTICE

This is a writ of error to the Superior Court of Chicago to reverse a judgment of that court in favor of Plaintiff, A. E. Lamarca, and against Defendant, Jack Lamarca, for the sum of \$100.

The controversy arose over a contract, evidenced by certain correspondence between the parties on August 19, 1911, and Plaintiff by letter responded the defendant on August 21, 1911. In answer to this letter, defendant offered to purchase of Plaintiff seven tons of the kind referred to in Plaintiff's letter of August 19th, at \$14.00 per ton and 7 x 6 nails. On August 21, 1911, Plaintiff wrote to-  
Plaintiff in part as follows:

"As soon as we can get around to it I shall be  
will be able to load you about four carloads. As for  
this order is old and will be long in the way  
please. Our office is not in the same as last year  
it would of time have to be given to make sure  
that we use."

On August 22, 1911, in answer to this defendant wrote: "It  
will be satisfactory that you will all the money that you  
have " " at the price quoted you at \$14.00 per ton  
and 7 x 6 nails of the kind of August 19th Plaintiff  
aliquot are ordered, \$14.00 a ton, at which time in the de-  
fendant.

On August 23, 1911, defendant wrote Plaintiff  
to "be delivered promptly to order. Payment for same to be

scrap iron you sold me." Plaintiff by letter dated October 13, 1915, refused to deliver any more material to defendant until the latter had paid for the carload already delivered to him. On October 14, 1915, defendant wrote complaining of the quality of the material sent him by plaintiff; yet, in this letter, and again on October 22, 1915, he offered to pay plaintiff for the scrap iron only in the event that plaintiff would deliver to him all of the scrap iron which plaintiff had in August, 1915.

It is conceded that the defendant has obtained from the plaintiff a carload of scrap iron which he has refused to pay for. One reason assigned by him for this refusal is that the quality of the material delivered was not such as plaintiff was required to deliver to him under the terms of the contract. We do not think there is much merit in this contention. The correspondence between the parties does show that defendant did make some complaint of the quality of the material delivered to him, but notwithstanding that fact he continued to demand of the plaintiff the delivery of two or three carloads more of the same material.

The defendant also insists that he was not required, under the terms of his contract with plaintiff to make payment for any of the material ordered until there had been a delivery to him of all of the material which plaintiff had in his possession. This defense cannot be allowed. The contract was not for any specific quantity of scrap iron; it was indefinite as to the amount that was to be delivered to the defendant, and, in that the contract contained no express provision as to the time of payment, it will be presumed that payment became due as of the date of the delivery of the material.





Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

THEORY OF THE EARTH IN THE PAST, AND

JUDGMENT OF THE LATEST THEORY AS TO THE

REASON.

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THEORY OF THE EARTH IN THE PAST, AND

JUDGMENT OF THE LATEST THEORY AS TO THE

REASON.

W. C. SWIGART,  
Appellant,

vs.

HARRY J. STOOPS, FRANK McKEY,  
Trustees in Bankruptcy of the  
Estate of Harry J. Stoops, Bank-  
rupt, C. C. MITCHELL and BATES  
MACHINE COMPANY, a corporation,  
Appellees.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

204 I.A. 194

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County.

On and prior to October 10, 1914, the defendant, Harry J. Stoops, was indebted to various persons at Maquoketa, Iowa, in the sum of about \$17,600, the payment of which he had secured by the execution and delivery of a mortgage on a 640 acre farm located in Nebraska. W. C. Swigart, the complainant, was the owner of an interest in this mortgage. The question in controversy is as to the right of the complainant to foreclose two certificates of stock of the Bates Machine Company, of the par value of \$5,000 each, one being of preferred stock and the other of common stock. Swigart contends that these certificates of stock were in his possession as security for the payment of certain notes given by the defendant Stoops to complainant. Stoops failed to pay the notes when due, and the complainant filed his bill in the Circuit Court to foreclose upon the certificates of stock in question. These certificates were originally issued to the defendant C. C. Mitchell, who endorsed them in blank and delivered them to the defendant Stoops on October 10, 1914. At the time Stoops received the stock from Mitchell he delivered to Mitchell a trust receipt, in which he agreed to return the stock on or before 3 p. m. of October 15, 1914. On the day Stoops received the certificates he went to



U. S. DEPARTMENT OF JUSTICE

Washington, D. C.

1934

RECEIVED  
U. S. DEPARTMENT OF JUSTICE  
WASHINGTON, D. C.  
JANUARY 10, 1934

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RECEIVED JANUARY 10, 1934

This is to certify that the following is a true and correct copy of the original as filed in the office of the Secretary of the Department of Justice.

On and prior to January 10, 1934, the following  
entry is shown, was included in various returns of the  
year, in the year of about \$17,500, the payment of which he  
had received by the execution and delivery of a mortgage on  
a PAC same time located in the year. U. S. Treasury, Inc.  
neighborhood, and the owner of no interest in this mortgage.  
The question is controverted is as to the time of the  
completion of the mortgage and execution of deed of the  
Baker Building Company, at the year of \$17,500, which was  
paid of several years and the year of about 1934.  
Various persons who have testified at some time in  
the proceedings as to the time of the payment of certain money  
given by the defendant to the plaintiff. Various other  
to pay the debt now due, and the plaintiff filed his bill  
in the Circuit Court to recover from the defendant at  
that in question. Great difficulties were undoubtedly caused  
in the testimony of the plaintiff, and appeared from the fact that  
delivered that in the defendant's return to January 10, 1934.  
At the time the plaintiff received the cash from the defendant he de-  
livered to the plaintiff a paper receipt, in which he stated he  
received the cash on or before 5 P. M. of January 10, 1934.

Maquoketa, Iowa, and had a conference with Swigart and others, and later on the same day he delivered to Swigart the certificates in question as collateral security for his, Stoops', notes for the sum of \$9,324.60, which was the amount, with accrued interest, due from Stoops to Swigart upon notes previously held by Swigart and certain of his associates. Payment of the earlier notes was secured by the farm mortgage of \$17,600 upon the said land located in Nebraska. Swigart released Stoops' farm from the lien of this mortgage at the time he accepted the notes for \$9,324.60 and the two stock certificates.

The evidence discloses that a month or two before these transactions in October were had Stoops had endeavored to procure from Swigart the release of the farm mortgage referred to, and that he informed Swigart that he was the owner of stock of the Bates Machine Company. He suggested at this time the giving of this stock as collateral security in lieu of the farm mortgage. Following this conversation Swigart and Stoops met Mitchell in Chicago, and Swigart inquired of Mitchell as to the value of the Bates Machine Company stock and was told by Mitchell that he thought it was all right. This was the only inquiry made by Swigart or any of his associates concerning the stock of the Bates Machine Company. Subsequent to the time of the delivery of the stock certificates to Swigart, Stoops was adjudicated a bankrupt.

The defendant Mitchell filed his cross-bill alleging therein that he was the owner of the stock in question; that Stoops never had any title to it, but held it as bailee only under the trust receipt referred to; that he had made frequent demands upon Stoops for the return of





the certificates, which demands had been refused; that Stoops had no title to the certificates which he could convey or assign to the complainant herein, and that the alleged assignment did not pass any right to the possession of or title to the stock certificates.

The decree of the Circuit Court was in favor of the contentions of the defendant Mitchell, on the theory that while the evidence disclosed that Mitchell was careless and imprudent in signing his name to the certificates of stock in question, such certificates not being negotiable instruments, all persons who took them did so subject to notice of whatever rights Mitchell had in the stock the ownership of which was evidenced by the certificates.

In its decree the Circuit Court held that Swigart, complainant, acquired no title or rights in and to the stock certificates, endorsed in blank by the defendant Mitchell, and which were delivered by Stoops to Swigart as security for the payment of notes given in exchange for the mortgage.

The only question presented for decision in this court is whether the defendant Mitchell is estopped by his act in signing the certificates of stock in blank and the delivery of them to Stoops. The evidence taken on the trial shows that the complainant, Swigart, received the certificates in good faith and for a valuable consideration. The case of Otis, Admr., v. Gardner et al., 105 Ill. 436, seems to be almost exactly in point:

"Sheridan Wait, in his lifetime, was the owner of one hundred shares of the capital stock of the Calumet and Chicago Canal and Dock Company, of the par value of \$10,000, represented by certificates issued to him. Written on the back of each certificate was a blank assignment and power of attorney, that would authorize the assignee to have the stock represented by such certificates formally transferred to him on the books of the company. On the 16th day of March, 1875, Sheridan Wait endorsed the certificates by signing his name below





the blank assignment and power of attorney, and then delivered them to Chauncey T. Bowen, and took therefor his written receipt, in which it is recited, 'which said one hundred shares of stock I have borrowed of him, and agree to return on demand.' Concerning the use Bowen might make of such stock, the receipt is silent, nor does the use to be made of it by the borrower appear from any testimony in the case. Afterwards, on the 9th day of November, 1875, James H. Bowen, being indebted to Jefferson Gardner on two promissory notes, each for \$4,262.25, for borrowed money, pledged these certificates of stock as collateral security for the payment of such notes, and delivered them to Gardner, endorsed in blank, as they had been received by Chauncey T. Bowen."

"It was pledged to Gardner, in the usual course of business, as collateral security for the indebtedness of the holder, and was taken in good faith, without the slightest knowledge that anyone other than the pledgor claimed or had any interest in the stock represented by the certificates. As has been seen, the certificates of stock were placed in the hands of Bowen by the intestate in such condition they could be readily sold or hypothecated by him, and if his assignee made an improper use of them, the assignor, if living, could get no relief against that which he deliberately authorized to be done, if it would affect injuriously an innocent purchaser for value, and his personal representative can have no relief that could not be granted on a like bill by the intestate, if living. The principle is, that when one of two or more persons must suffer loss, upon him whose conduct made it possible for loss to occur should the consequences ultimately rest."

It is true, as insisted by counsel for defendant Mitchell, that the blank endorsement of defendant upon the certificates of stock did not thereby render the certificates strictly negotiable instruments. This endorsement was, however, the voluntary act of the defendant. Common intelligence should have informed him that it would be an easy matter for his transferee to make any use he might see fit to make of these certificates notwithstanding the limitations of the right of such transferee as indicated by the receipt given to defendant Mitchell at the time he delivered the certificates to Stoops. To permit an owner and endorser of stock thus to deny the claims of an innocent holder thereof under





circumstances similar to those shown by this record would seriously interfere with a custom of transacting business that has obtained generally among bankers and brokers.

The trial judge in his oral opinion seems to have been of the view that both defendant and complainant had acted in good faith in the transactions referred to, but that the defendant, Mitchell, had in fact been guilty of negligence in delivering the certificates to Stoeps. We are of the opinion that the decree in favor of the defendant is erroneous. The transfer of the stock certificates in question was made to complainant in the usual course of business. There is no basis in the evidence for the argument that the complainant acted negligently or in bad faith in receiving the stock certificates. The evidence is clear that the complainant surrendered an interest in the released mortgage amounting to \$9,324.60, and he took in lieu thereof notes of Stoeps for the same sum, secured by stock certificates represented to have a value of \$15,000.

Counsel for complainant has cited a large number of cases which sustain his contention that the defendant, under the facts of this case, is estopped to deny the right or title of the complainant to the stock certificates. Otis, Admr. v. Gardner, 165 Ill. 436; McCarthy v. Crawford, 238 Ill. 38; Johnson v. Milming, 156 Ill. App. 208; National City Bank v. Wagner, 216 Fed. 473; 1 Cook, Stocks and Stockholders, secs. 411-16.

Stoeps was a defendant, and he permitted a decree pro confesso to be entered against him. There can be no doubt on this record that his conduct was grossly fraudulent with respect to the defendant Mitchell; the loss, however, occasioned by this conduct should in equity be borne by the party who by his voluntary act had placed it within the power of Stoeps to perpetrate the wrong.





In the case of Shattuck v. American Cement Co.,

205 Pa. St. 197, directly in point, the court said:

"When the certificates of stock, with the transfers in blank endorsed upon them, were placed in the hands of Stahl & Straub by Shattuck, he acted innocently and in good faith; but another, equally innocent, dealt with one of the men to whom he had entrusted his stock with all the indicia of ownership; and if one of these two innocent persons is to suffer, the rule, as everywhere recognized, is that, where one by his own act arms another with power to act for him, he who so armed the wrongdoer must suffer for the consequences of the wrongdoing."

"A man is not prevented, by estoppel, from telling the truth. He is only barred from the assertion of a right or title by some previous action or conduct on his part which would render the present assertion of his right unjust. Where, for instance, the owner of shares of stock signs a letter of attorney to transfer in blank, he confers an authority upon any subsequent bona fide holder, for value, to fill in his own name, and is estopped from denying the existence of such authority. He is prevented by his own act, viz., his signature to a blank power of attorney, from asserting his title; for to permit him to insist upon it after arming another with an apparent authority to divest it, would be contrary to justice and good faith." Bispham's Principles of Equity, 5th ed., sec. 280, p. 394.

Authorities conclusive of this question are abundant.

The decree of the Circuit Court is reversed and the cause is remanded with directions to enter a decree in accordance with the prayer of the bill.

REVERSED AND REMANDED

WITH DIRECTIONS.





2577

98 - 22519.

CITY OF CHICAGO,  
Defendant in Error,

vs.

FRANK MOONAN,  
Plaintiff in Error.

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99 - 22520

CITY OF CHICAGO,  
Defendant in Error,

vs.

CHARLES DEIMER,  
Plaintiff in Error.

204 I.A. 195

Error to

Municipal Court  
of Chicago.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

These cases come to this court on writs of error to the Municipal Court of Chicago; by order entered in this court the cases have been consolidated for hearing.

Defendants were arrested on the 7th day of April, 1916, at 3 o'clock P. M., while standing at the bar of a saloon in the City of Chicago; they were charged with a violation of section 2012 of the Municipal Code of Chicago. Trial by a jury was waived, and the trial judge after hearing the evidence imposed a fine of \$100 and costs against each defendant.

The only question raised by the defendants is that the evidence was not sufficient to support the finding and judgment of the trial court.

The judgment must be affirmed. Section 54 of the Municipal Court Act provides, in substance, that the Municipal Court shall take judicial notice of the ordinances of the City of Chicago. In the case of City v. Tearney, 187 Ill. App. 441.





2.

the court said:

"While the Municipal Court act requires the Municipal Court to take judicial notice of city ordinances, there is no provision in that or any other act, so far as we are advised, requiring or authorizing this court to do so. If a party to a suit in the Municipal Court desires to have reviewed any ruling of that court involving the construction of the language of a city ordinance, such ordinance must be made a part of the record in the same manner as if the suit had been tried in the Circuit Court."

The record brought here does not contain any information as to the provisions of the ordinance for the violation of which the defendants were penalized in the Municipal Court, and for this reason, if for no other, the judgment of that court should be affirmed.

We have, however, examined the evidence taken at the trial, and are of the opinion that it was sufficient to sustain the findings and judgment of the trial court. Defendants were arrested in a saloon. The defendant Noonan testified that he had gone into the place to get a contract for painting the saloon; that he had been in Hot Springs for his health all winter; he produced a business card, which indicated that he was by occupation a painter, and also the testimony of one Mullen, who stated that he knew Noonan to be a painter; that he, Mullen, offered Noonan a contract which he refused; that he, Mullen, had met Noonan prior to the trial about once a year. Delmar claimed that he was a salesman and that he had worked for one Snell, but had not been employed by anyone for a period of five months preceding his arrest. No evidence was offered that Noonan had ever worked or performed services for anybody. Several police officers testified that the defendants were by reputation well known pickpockets. There is evidence in the record from which the court was authorized to disbelieve Delmar's statement that he had been employed by Snell; and there



3.

was also evidence heard from which it appeared that the defendants had "hung out," as expressed by the witnesses, in places frequented by crooks, thieves and pickpockets. Noonan testified that he had been convicted of a violation of law and had been sentenced to the reformatory at Pontiac when he was a boy.

Upon the whole record we do not believe that the finding and judgment of the trial court were so manifestly against the weight of the evidence as to warrant a reversal of the judgment; it is therefore affirmed.

AFFIRMED.



and also evidence which it appears that the re-  
spective "fact" was, as explained by the witness, in  
plain view of the jury, and as plain evidence. I am  
satisfied that the jury was not deceived as to the  
fact and was not deceived as to the testimony of the  
witness.

Upon the whole, I am not satisfied that the  
jury was not deceived as to the fact and as to the  
testimony of the witness as to the fact of the  
testimony; it is therefore affirmed.

affirmed.

DAN BALDINO, trading  
as Dan Baldino & Co.,  
Appellee.

vs.

HYMAN KADISON,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

204 I.A. 197

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment in the Municipal Court against the defendant for the sum of \$975, and the defendant brings the case here for review.

The plaintiff is a real estate broker; he called on defendant at his home on April 19, 1913, and told him that he had a purchaser for defendant's property. At that time the parties executed a real estate contract which bound defendant to sell his property to one DiVito. This deal was never consummated, through no fault of the defendant.

Thereafter, in June, 1913, plaintiff proposed an exchange of defendant's property for the premises of one Laparsky, and at that time defendant said to plaintiff that he did not care for Laparsky's property. A few days thereafter one Gerard, an employee of plaintiff, told defendant that a trade could not be made for the Laparsky property, but that he thought that a man he had in mind would trade for defendant's place. Defendant insisted that he wanted cash for his property, and not a trade.

In April, 1914, through the efforts of a real estate broker named Vacco, the defendant entered into a contract for the exchange of his property for real estate owned by one Conforti. This exchange was part of a

THE DISTRICT COURT, ST. LOUIS, MO.  
 IN RE: THE ESTATE OF JAMES EARL RAY, DECEASED.  
 JAMES EARL RAY, Plaintiff,  
 vs.  
 THE DISTRICT COURT, ST. LOUIS, MO., Defendant.

201-1-1-187

BY JUDGE JOHN EDGAR HOOVER, JR. Clerk of the Court.

Plaintiff claims a judgment in the sum of \$100,000.00 against the defendant for the sum of \$100,000.00 and the defendant brings the same here for review.

The plaintiff is a real estate broker; he

acted as defendant's agent on April 15, 1953, and

sold the land on his purchase for defendant's property.

At that time the land contained a well which contained

water which defendant is said his property is one divided.

This fact was not understood, however on April 15, 1953

defendant.

Thereafter, in June, 1953, plaintiff pro-

posed an exchange of defendant's property for the same

of the property, and at that time defendant said he

did not want the land for plaintiff's property, a few

days thereafter one named, an employee of plaintiff,

was informed that a check would be made for the

same property, but that he should not be told in

any way about the defendant's check. Defendant informed

that he would cash the check for the plaintiff, but not a check.

In April, 1954, defendant was informed of a

check which was cashed, the defendant advised that a

check for the amount of his property for the same

by the plaintiff. The exchange was not a

"three cornered deal." The defendant desired to obtain cash for his property, and Vacco in order to close the deal procured a person to contract with defendant for the purchase of the Conforti property which defendant had received in exchange for his premises.

Plaintiff testified that in June, 1913, he told defendant where Conforti's property was located; that he gave defendant Conforti's name as owner, and that he had sent Gerard, his employee, to see Conforti; that Gerard called on Conforti and proposed an exchange of his, Conforti's, real estate for that of the defendant; that Conforti said he would see as soon as he "got to feeling better"; that he didn't know whether he would trade or not.

Conforti testified that his conversation with Gerard occurred in April or May, 1913; that he afterwards went to Hot Springs where he remained for two months, returning to Chicago in June, 1913; that he again went to Hot Springs in January, 1914, where he stayed for two months before returning to Chicago, after which the deal was closed with defendant.

The evidence does not disclose that plaintiff or any one representing him attempted in any way to dispose of defendant's property subsequent to June, 1913, ten months before the deal was closed with Conforti, and nine months before Vacco introduced Conforti to defendant. The evidence is clear that the defendant was unwilling at any time to trade his property and that he had insisted upon a sale for cash. The trade that was finally agreed upon between defendant and Conforti was the result of the successful efforts of the agent, Vacco, in procuring a purchaser for the property of Conforti which the defendant



"After 'corrected deed.' The defendant advised in writing that the property, and deed in order to allow the deed to be recorded with defendant for the deed to be recorded with defendant which defendant and receiver of the defendant property which defendant and receiver in exchange for his promise.

Defendant received deed in June, 1915, and said defendant when defendant's property was located that he gave defendant defendant's name as owner, and that he had said to defendant, all right, to see him later; that defendant called on defendant and proposed an exchange of his, defendant's, real estate for that of the defendant; that defendant said he would see him as soon as he got to having his deed; that he didn't know whether he would trade or not.

Defendant testified that his conversation with defendant occurred in April or May, 1915; that he afterwards went to the defendant's place and remained for two months, visiting as ordered in June, 1915; that he again went to the defendant in January, 1916, where he stayed for two months before returning to Chicago, after which the deed was closed with defendant.

The evidence does not disclose that defendant at any one representing him executed in any way, in regard to defendant's property subsequent to June, 1915, and the same before the deed was closed with defendant, and also made before these statements defendant to defendant. The evidence is that that the defendant was unwilling at any time to trade his property and that he had located upon a site for work. The fact that was finally agreed upon between defendant and defendant was the result of the successful efforts of the agent, named, in procuring a purchase for the property of defendant and the defendant.

took in trade.

We are of the opinion that the plaintiff was not the procuring cause of the sale of defendant's real estate. The evidence shows that the plaintiff made no efforts to consummate a trade of Conforti's property for that of the defendant during a period of ten months preceding the transaction in question; he made no attempt to bring Conforti and the defendant together, and was specifically warned by the defendant that he would not consider a proposition involving a trade of his property for other real estate. It is true that the plaintiff, through his agent Gerard, had had one conversation with Conforti, and that Conforti at that time refused to seriously take up with plaintiff or his agent the question of a trade of his property for that of the defendant; and at this point, so far as the record discloses, plaintiff ceased his efforts to bring about a sale of defendant's real estate.

For the reasons indicated the judgment is reversed and judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT HERE.

back to trade.

It was of the opinion that the plaintiff was

not the proper owner of the sale of defendant's land.

For reasons above said the plaintiff made no af-

firm to purchase a share of plaintiff's property for cash

at the defendant's request or for the purpose of

the transaction in question; no such an attempt to obtain

plaintiff and the defendant together, and was specifically

formed by the defendant and he would not consider a

proposition involving a share of his property for other

than what is in fact the plaintiff, through his

agent, had had one conversation with plaintiff, and

that conversation at that time related to various things

with plaintiff or his agent for question of a share of his

property for that of the defendant; and at this point, as

far as the record shows, plaintiff ceased his efforts

to bring about a sale of defendant's real estate.

For the reasons indicated the judgment is

reversed and judgment of affirmance will be entered in

this court.

REVEREND AND HONORABLE JUDGE

GENERAL FIRE EXTINGUISHER CO.,  
Appellant,

vs.

WILLIAM SEYMOUR,  
Appellee.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

204 I.A. 198

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a bill to establish a mechanic's lien. The issues presented by the pleadings were referred to a master to hear evidence and report his findings and conclusions to the court. The master reported in favor of the defendant and recommended the dismissal of the bill for want of equity. A decree was entered dismissing the complainant's bill for want of equity, and the case is brought here by plaintiff for review.

It is revealed by the evidence taken by the master that the defendant, William Seymour, in May, 1912, was the owner of a large building in Chicago which at that time was in the course of construction. Seymour, on May 16, 1912, called at the office of one Neracher, agent of complainant in Chicago, and talked with Neracher and Alfred Fritzsche, western general manager of the complainant company, with a view to employing the complainant company to complete the putting in of a sprinkler system in his building. Seymour before this time had partially installed this system through his own employees. Fritzsche, testifying, said that Seymour "stated that in addition to placing the sprinkler heads on the pipes and the air valves on the risers that there would probably be some additional work required in the way of pipe fitting as the building went





along that he would want us to do, and was satisfied to have us do it on the day work basis. I drew the contract and it was signed while I was there." <sup>following</sup> The contract referred to by Fritzsche is as follows: <sup>was entered into:</sup>

"Chicago, May 16, 1912.

Mr. Wm. Seymour,  
5117 Hibbard Ave.,  
Chicago.

Dear Sir:-

It is understood and agreed that we are to furnish you with the number of heads required for sprinkler equipment in the building at 1501-11 Johnson street, at our regular price of \$1.00 each, less 50% discount, making a net price to you of 50¢ each; any air valves required at \$1.75 each, which includes connections excepting labor for installing same, you to buy any other materials required. Or if we furnish such materials we are to bill same to you at our best mill prices. We will furnish the labor at \$1.50 per hour for fitter and helper.

If we furnish any materials outside of the air valves and sprinklers you are to pay any freight, hauling or express charges involved in the shipments or hauling of said extra materials.

We will start immediately upon arrival of material and will prosecute the work with due diligence until completion.

Very truly yours,  
GENERAL FIRE EXTINGUISHER COMPANY,  
By A. J. Heracher, Dept. Agt.

ACCEPTED:  
WILLIAM SEYMOUR."

~~The complainant had had nothing to do with installing the sprinkler system prior to the date of the contract.~~

~~Coleman, contracting engineer for complainant, testified that he met Seymour in 1912; that he had with Seymour examined the premises and had reported that 1960 sprinklers would be required for the building; that he ordered the sprinklers from "our Warren plant"; that they were shipped from Warren five or six days later, "but were lost or delayed in transit. We started a tracer two weeks later." This witness testified that the usual time for freight from Warren to Chicago is ten days; that the order for sprinklers was forwarded May 17, 1912, and that the ma-~~





terial was shipped on May 22, 1912, and arrived in Chicago July 9, 1912; that Seymour had said to him in September that he would send him a check for the bulk of the account.

There can be no doubt, however, that during the time that elapsed between the making of the contract in May, and the final abandoning of the work by complainant in September, Seymour had complained of the delay in the furnishing of the materials which he had contracted for and in the doing of the work provided for under the contract.

Boyle, an employee and witness for the complainant, testified that on August 6th Seymour had telephoned him about the payment of the bill; that he, Seymour, was very angry and sarcastic, and said he would not pay for the sprinklers until they were counted.

John F. Bross, for complainant, testified that he had charge of the work for complainant of installing the sprinklers in the building; that the work began July 15th and continued until July 24th, 1912; that he had installed for defendant 2030 sprinkler heads by screwing them into the outlets in the pipe left for them; that he returned to work in the building on the 28th day of August, and did some testing of the pipes and sprinkler heads; that the testing done at the building was done at the request of Seymour; that no testing of the pipes was done above the first floor of the seven story building, for the reason that the water pressure necessary to do this work could not be had above the first floor.

There was much evidence heard by the master in respect to the issues raised by the pleadings, and some of the testimony was conflicting. Complainant insists that it has furnished 2120 sprinkler heads, 4 air valves, and 167 hours of labor of a fitter and helper, under the written



testimony was elicited on May 22, 1932, and arrived in Chicago

July 2, 1932; that Raymond had said to him in substance

that he would send him a check for the full of the amount.

There can be no doubt, however, that during

the time that elapsed between the making of the contract in

May, and the final consummation of the work of consummation in

September, Raymond was conscious of the fact in his own

mind of the practice which he had conducted for and in

the line of the work provided for under the contract.

While, on September 22, 1932, and August 10, 1932,

Raymond, testified that on September 22, 1932, he had

him about the payment of the bill; that on September 22, 1932,

and on September 22, 1932, and on September 22, 1932, he had

until they were called.

June 2, 1932, for complaint, testified that

he had knowledge of the fact for consummation of installing the

apparatus in the building; that the work began July 1932

and continued until July 1932, 1932; that he had knowledge

for September 22, 1932, that he had knowledge of the fact

outside in the line of the work; that he returned to work

in the building on the 22nd of August, and his work con-

tinued at the place and duration thereof; that the building was at

the building was at the request of the owner; that on Sep-

tember 22, 1932, he had knowledge of the fact that the owner

was building, for the reason that the work was not com-

plete as he was not sure that he had done the first floor.

There are many evidence points in the record in

respect to the work done by the building, and that it

the building was not finished. The building was not

the building was not finished, and it was not, and it

was not, and it was not, and it was not, and it was not

contract with Seymour at agreed prices aggregating \$2610.50, and that it has not been paid any part of this sum. For the defendant it is contended that the contract under which the claim of complainant arose is one for the installation of a complete sprinkler equipment in the building of the defendant; that complainant so delayed the doing of the work provided for in the contract as to cause serious damage to the defendant, and that the complainant has failed to perform and complete the work provided for under its agreement with the defendant.

That there was much delay in the doing of this work is, we think, without much question on this record. The contract was made on the 16th day of May, 1912. There was a delay of five days more before the goods were shipped from Warren to Chicago; the goods did not arrive in Chicago until the 9th day of July, 1912, and work upon the defendant's building was not begun by the complainant until the 15th day of July, 1912, nine weeks after the contract had been signed. There is evidence in the record from which it may be found that the delay in the shipment to some indefinite degree was caused by a railway strike, but from all of the evidence taken on this phase of the controversy it is apparent that Seymour had good reason to complain of the delay in the doing of the work and the furnishing of the materials provided for by the contract.

From the evidence relating to the circumstances which led up to the execution of the contract in question, it is obvious that the defendant, Seymour, had made a somewhat unsuccessful attempt to install a sprinkler system in his building. He had done much of the piping required for





the system, but as the work progressed it developed that the pipes used would be inadequate for several reasons, for a system such as the defendant desired. These considerations led him to the making of the contract with the complainant.

It is urged on behalf of the complainant that the master improperly admitted oral testimony in connection with facts and matters not expressed or referred to in the contract itself. We do not think there was any error committed in this particular. Oral testimony is frequently admissible for the purpose of explaining circumstances attending the making of a contract, and it is a familiar rule that the consideration for the making of a written agreement may be inquired into by parol.

The real controversy here seems to be that on the part of the complainant it is said that the contract of May 16, 1912, is an express written contract, and that it is an agreement for the delivery to the defendant of a certain, specified kind of merchandise, and for the performance of certain labor for him at a fixed price per hour for such labor. The defendant insists that the contract itself expressly requires that the complainant, before it can properly claim a lien against defendant's property, must first show that it has completed and performed all of the things required of it under the contract; that the contract is one for the completion of the sprinkler equipment in the building, and that under the terms of the contract the complainant is required not only to furnish the material at the price specified in the contract, but also to furnish all other materials and all labor necessary for a complete installation of the system.

We are inclined to agree with the contention of counsel for defendant. The complainant specifically promises



the system, but as the work continued it developed that the lines used would be inadequate for several reasons, for a system such as the defendant desired. These conditions since led him to the making of the contract with the defendant.

It is urged on behalf of the defendant that the master improperly admitted such testimony in connection with those who admitted that the work was not done in the defendant's office. It is not being shown that any other defendant is liable. Only defendant is responsible for the purpose of making a statement as to the making of a contract, and it is a familiar rule that the consideration for the making of a contract is the work as looked into by jury.

The real controversy here seems to be that in the part of the complaint it is said that the contract of May 14, 1912, is an express written contract, and that it is an agreement for the delivery of the defendant of a certain specified kind of merchandise, and for the performance of certain labor for him at a fixed price per hour for each laborer. The defendant admits that the contract itself expressly recites that the consideration before it was properly given a lien against defendant's property, when first when that it has completed and received all of the value required of it under the contract; that the contract is one for the completion of the specified equipment in the building, and that under the terms of the contract the defendant has received not only the finished work but also the price specified in the contract, but also to furnish all other materials and all labor necessary for a complete installation of the system.

It is insisted on behalf of the defendant that the consideration was not given with the completion of the work, but that the consideration was given with the completion of the work.

in the contract - drawn by itself and which for that reason will be construed more strongly against it - that "we will start immediately upon arrival of materials and will prosecute the work diligently until completion," and again, "if we furnish any materials outside of the air valves and sprinklers you are to pay any freight,hauling or express charges involved in the shipments of the hauling of said extra materials." From the use of this language it is clear that both parties to the contract had in mind at the time the contract was executed the doing of work which would or might require materials other than those specifically referred to in the first paragraph of the contract. The promise of the complainant to "prosecute the work with due diligence until completion," under the evidence may reasonably be held to refer to the work which both parties must have had in mind at the time of the making of the contract - that of the completion of the work which the defendant himself had partially performed in his building. That the parties had in mind the performance of this work generally may be assumed from other language and words in the contract. The contract provides that the complainant shall furnish "the number of heads required for sprinkler equipment \* \* any air valves required," and this may reasonably be held to refer to the requirements of a completed system such as under the circumstances it appears must have been the defendant's only reason for entering into the contract at all.

Complainant insists that the contract is perfectly clear and unambiguous. We do not agree with this contention. The contract is far from clear, and there is some ambiguity in its express language as to what work was intended to be performed by the complainant. Under these

in the contract - drawn by itself and signed for that purpose  
 will be considered as a separate document - but the will  
 shall immediately upon arrival of contract and will pass-  
 note the work differently well completed, and again, "if  
 we received any material evidence of the will before and  
 therefore you are to say any further evidence or evidence  
 required involved in the substance of the decision of said  
 order remains." Even the use of such language it is  
 clear that such notice is the contract and is not a  
 the case the contract was executed the day of work  
 which would be right, together with the fact that the  
 specifically referred to in the first paragraph of the  
 contract. The promise of the completion of "presented  
 the work with the highest quality completion," under the  
 system may reasonably be held to refer to the work which  
 both parties must have had in mind at the time of the making  
 of the contract - that is the completion of the work which  
 the defendant himself had actually performed in his building.  
 That the parties had in mind the performance of this work  
 necessarily may be assumed from other language and words in  
 the contract. The contract provides that the completion  
 shall furnish "the number of hours required for completion  
 of the work" - and this is not unreasonable, and this may reasonably  
 be held to refer to the completion of a completed system  
 even so when the circumstances it appears that even the  
 defendant's only reason for refusing to complete it at all,  
 defendant insists that the contract is not  
 fairly stated and unambiguous. It is not stated that the  
 contract is the work of art, and there is some  
 ambiguity in its written language as to what was in-  
 tended to be performed by the defendant. Under these



~~circumstances we may well look to the construction placed upon the contract by the parties themselves. It is conceded that in the performance of the work required by the contract the complainant <sup>took</sup> ~~did take out~~ about 1,000 feet of defective piping, and install <sup>ed</sup> ~~adequate~~ piping in place thereof in the system; that <sup>and it did</sup> ~~it had done~~ various kinds of other work in connection with the installation, all of which indicates that the complainant itself regarded the contract as one for the completion of the system rather than as being one for the furnishing and installing of particular equipment.~~

It is complained that the court erred in permitting the introduction of testimony as to a conversation had with Neracher, now deceased, who at the time of the making of the contract and prior thereto was agent for complainant. We are inclined to think that this evidence should not have been admitted; however, other evidence was properly admitted which we think justified the action of the master and the chancellor.

In our opinion the evidence fairly tended to show that there was much inexcusable delay in the commencement and prosecution of the work provided for by the contract, and that the complainant has not completed the work in accordance with its agreement with the defendant. The complainant in September, 1912, abandoned the doing of further work under the contract; the evidence discloses that at that time the sprinkler system was not completed. Hence the complainant is not entitled to the lien against the premises of defendant prayed for in its bill of complaint.

The decree of the Circuit Court will be affirmed.

AFFIRMED.





ALMA HEIZER,  
Defendant in Error,  
vs.  
JOHN W. HEIZER,  
Plaintiff in Error.

ERROR TO CIRCUIT COURT,  
COOK COUNTY.

204 I.A. 200

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A decree was entered by the Circuit Court of Cook County on December 23, 1908, in divorce proceedings, in which Alma Heizer was complainant, and the plaintiff in error here, her husband, John W. Heizer, was defendant. The validity of that part of the decree directing the payment of alimony to the complainant is questioned here.

In June and July, 1916, the complainant made an application to the court to fix the amount of alimony due from the defendant to her and accruing from the time of the entry of the decree up to the time that the application to fix the amount of alimony was made. The record discloses that on the motion to fix the amount of this alimony the court heard the testimony of several witnesses, and on July 10, 1916, entered an order in the case as follows:

"On motion of F. A. Woodbury and Otto Schusterman, solicitors for complainant, and the court having considered the testimony and arguments of counsel, finds the defendant, John W. Heizer, earned the sum of \$6,036 and that after deducting such sums as allowed by the decree, hereinbefore entered, there is now due and unpaid to the complainant the sum of \$2,862.07, and judgment entered thereon and order for execution thereon allowed."

In the original decree entered in the case on December 23, 1908, the defendant was adjudged guilty of extreme and repeated acts of cruelty towards and against the complainant, and the marriage relationship existing

ALMA HENRY

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between the complainant and the defendant was dissolved, and it was further ordered in the decree that the defendant pay alimony to the complainant - "after the deduction of such items of expenditure as car fare, dues in his labor union and life insurance dues and such other expenses as are necessarily connected with his employment, do pay weekly, beginning with the week ending January 2, 1909, to the complainant, Alma Heizer, as alimony for the support of herself and their said two minor children, Pearl Heizer and Esther Heizer, one-half of his weekly earnings, until the further order of the court."

The main contention of the defendant is that the court was without jurisdiction to enter the order of July 10, 1916, for the reason that it is based upon a decree that is in part void - that that part of the decree which directs the payment of alimony by the defendant to complainant is void because the court had no power to enter a judgment for the payment of money depending or to be calculated upon the happening of future events indefinite and uncertain in their nature.

The decree in this cause is not for a definite, certain sum of money; execution could not issue upon it, and its enforceability would of necessity depend upon the finding of facts which could in no way be determined by reference to any of the recitations or language of the decree itself.

In Smith v. Trimble, 27 Ill. 152, the court held that a decree should ascertain the precise amount that was required to be paid, and that this amount should not be left to computation.

In Carter v. Lewis, 29 Ill. 500, the Supreme Court held that a decree for \$700 "and upwards" was valid only as to the certain sum of \$700 and void for the residue.





The case of Morrison v. Smith, 130 Ill. 304, relied upon by counsel for complainant, is in fact against their contention. The Supreme Court held that while the decree was technically erroneous in not finding the sum to be paid, including the interest, yet as the dates were given, so that the amount rested only in computation, the error was an immaterial one and the case was within the rule which treats that as certain which is capable of being rendered certain. "A mere computation of six per cent. interest upon a given sum for a given period of time involves a mathematical calculation which can lead to but one result."

Any amount which might be claimed to be due under the decree in the case at bar could not be determined at any time by a mere mathematical calculation; that amount, in the nature of things, would vary with the terms and character of the employment as well as the expenses incurred by the defendant.

The right of complainant to alimony is derived from section 18 of chapter 40, Hurd's Revised Statutes, and the decisions of the courts of the State of Illinois interpreting that statute. In Ross v. Ross, 78 Ill. 402, it was held that where a decree for alimony gave the complainant substantially all the defendant's property and ordered her to pay his debts, it was evident that a portion of the alimony allowed was for the purpose of paying such debts, and that such decree was without precedent and unwarranted. While this authority does not discuss the precise question involved here, it is evident that the Supreme Court in cases of this kind is opposed to any radical departure from the power to fix alimony as prescribed by the statute and as such statute is interpreted by the courts.

In Phillips v. Edsall, 127 Ill. 535, it was held

The case of Boyd v. Boyd, 121 Ill. 204.

referred upon by counsel for defendant, is in fact against  
 their admission. The plaintiff's case is not in fact  
 even more technical than defendant's is not in fact  
 legal, involving the subject, and the law is not  
 that the court should only be satisfied, the court was in  
 fact satisfied and the case was within the rule which states  
 that no person can be made to believe anything certain.  
 "A mere suggestion is not a fact, interest upon a given  
 fact is a given fact of fact involves a categorical and  
 definition which can lead to the law result."

The court then said: no claim to be the

under the law in the case of fact could not be determined  
 at any time by a mere categorical definition; the court

in the case of Boyd, said very well with the law, and

showed by the evidence as well as the evidence involved  
 by the defendant.

The right of defendant to witness is not

from section 10 of chapter 10, but a direct question.

and the decision of the court of the state of Illinois in  
Boyd v. Boyd, 121 Ill. 204, is

was said that there is no reason for witness to be admitted  
 and witness to his the defendant's property and witness  
 for to see his father, it was witness that a portion of the  
 witness should not be the purpose of the law, and that

and that the court was right in its decision and that the

the law is not in fact and that the law is not in fact  
 involved here, it is witness that the law is not in fact

of this kind is not in fact and that the law is not in fact  
 power to the witness as provided by the law, and as such

is provided by the law.

In Boyd v. Boyd, 121 Ill. 204, it was said



that a decree for the payment of money is sufficiently certain though it does not state the exact amount of principal and interest, where it finds the necessary facts so that the exact sum due is only a matter of computation.

There are no facts found in the decree in the case at bar from which by any method of computation can be determined the sum that complainant insists is due her by way of alimony under the decree. Cases are numerous to the effect that a valid judgment or decree for the payment of money must provide for the payment of a fixed, definite sum. Counsel for complainant insist that the sum required to be paid under the decree in this case can be rendered certain by the application of the equitable rule that that is certain which may be rendered certain. We do not think that this rule has any application at all to the question raised here. Did the decree in this case recite any data from which the amount due under the decree could be determined by computation the rule could be applied, but uncertain and indefinite provisions of a decree for the payment of money cannot be rendered certain by resort to facts or matters exterior to the decree itself.

On motion of the complainant the trial court heard evidence, and in fact entered into the trial of an issue of fact for the purpose of determining the earnings of the defendant subsequent to the entry of the decree; having determined the amount of such earnings certain personal expenses were deducted therefrom, and an order was entered by the court for the payment to the complainant of one-half of the remainder so found. In our opinion the court was without jurisdiction to enter the order complained of.

It is claimed that certain errors were committed in the conduct of the hearing, and that the court also erred





in rulings as to the admissibility of certain evidence. We do not, in view of what has been said with reference to the power of the trial court to enter any order for the fixing of alimony in accordance with the decree, deem it necessary to decide these questions.

The order and judgment of the Circuit Court, entered in that court on the 10th day of July, 1916, will be reversed.

REVERSED.

It is a fact that the Government of the United States has been unable to obtain the necessary information from the Government of the United Kingdom to enable it to take the necessary steps to prevent the export of arms and munitions to the Government of the United Kingdom.

THE UNITED STATES OF AMERICA

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

J. E. KELLY,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 201

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant, J. E. Kelly, on August 14, 1916, about one o'clock in the afternoon, was driving an automobile west on Washington boulevard between 40th and 56th avenues, in Chicago. The automobile was followed by the complaining witness, a police officer, who placed the defendant under arrest and charged him with a violation of section 10 of the Motor Vehicle Law. On trial in the Municipal Court of Chicago, a jury having been waived, the court imposed a fine of five dollars upon the defendant. The case is brought here by writ of error to review the judgment of that court.

Section 10 of the Motor Vehicle law is as follows:

"No person shall drive a motor vehicle or motor bicycle upon any public highway of this State at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle or motor bicycle operated upon any public highway in this State, where the same passes through \* \* \* the residence portion of any incorporated city, town or village, exceeds fifteen miles an hour, \* \* \* such rates of speed shall be prima facie evidence that the person operating such motor vehicle or motor bicycle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person."

The police officer testified that he was riding on a motorcycle and had followed the automobile of defendant for a distance of fifteen blocks, and that the automobile





was moving for that distance at the rate of twenty-seven miles an hour. The defendant and his three witnesses testified that the automobile had moved at a rate of speed of from eighteen to twenty miles an hour; and on the testimony of defendant and those witnesses, if the testimony of the officer be disregarded, a prima facie case was made out for the people under the law.

It is insisted, however, that the evidence tended to show that Washington boulevard between 40th and 56th avenues at the time in question was not crowded and the traffic conditions were such that the speed at which defendant and his witnesses say that the car was moving could not be said to have been unreasonable and improper. The only evidence as to the traffic condition of the street at the time in question was that of J. C. Kelly, who testified that "the car traffic was not crowded." The evidence does show that there were several automobiles on the street at and during the time that the automobile was followed by the police officer. The evidence as to the rate of speed at which the car was moving was conflicting.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

who having the best distance of the race of twenty-seven  
miles an hour. The defendant and his three witnesses  
stated that the automobile was at a rate of speed of  
from fifteen to twenty miles an hour; and on the testimony  
of defendant and those witnesses, if the testimony of the  
officer is disregarded, a prima facie case was made out by  
the people under the law.

It is insisted, however, that the evidence  
failed to show that defendant was between 4000 and  
5000 feet at the time in question was not crowded and  
the traffic conditions were such that the speed at which  
defendant and his witnesses say that the car was moving  
could not be said to have been unreasonable and improper.  
The only evidence as to the traffic condition of the street  
at the time in question was that of J. W. Kelly, who tes-  
tified that "the car traffic was not crowded." The evidence  
does show that there were several automobiles on the street  
at and during the time that the automobile was followed by  
the police officer. The evidence as to the rate of speed at  
which the car was moving was conflicting.

The judgment of the Municipal Court will be af-  
firmed.

FITZPATRICK BROS.,  
a corporation,

Appellant,

vs.

JOHN E. CULHANE and M. H.  
CULHANE, trading as Halo  
Chemical Co.,

Appellees.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

204 I.A. 203

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Fitzpatrick Bros., a corporation, was engaged in the business of manufacturing and selling a cleaning and scouring powder, which it claims was adapted for household use; to designate this article it had adopted the trade name of "Kitchen Klenzer." It caused this trade name to be registered in the State of Illinois on May 8, 1912, and it also made application for the registration of a label containing its trade-mark, with this name thereon, in the United States patent office in 1908 and at subsequent times.

In the bill filed by complainant, Fitzpatrick Bros., it was alleged that the defendants, John E. Culhane and M. H. Culhane, doing business as Halo Chemical Company, disregarding the rights of the complainant, had fraudulently and with an intent to deceive the public and to induce the public to purchase other and spurious goods by mistake for those of complainant and thereby to obtain its trade and business, and with the intent to obtain the benefit of complainant's advertisements, have recently and now are unlawfully and without the permission of the complainant selling and offering for sale in the city of Chicago and elsewhere large quantities of a cleaning preparation not manufactured by the complainant, under a name embodying the words "Kitchen Cleanser" conspicuously placed upon their label; that the de-



THE COURT

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THE UNIVERSITY OF CHICAGO

Information not to be released under E.O. 1.35

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of "Lumbermen" is a very fine study in the art of the novel.

Page 1 of 1

made available for the execution of a last will and testament.

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See page 411 for a list of related books, articles, and documents.

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defendants intend and threaten to continue the use of the said name, Kitchen Cleanser, in connection with the cleaning preparation sold by them, and that by so doing they, the defendants, will cause the complainant great and irreparable injury; that complainant has suffered damages to the extent of more than \$5,000 by reason of the alleged unlawful acts of the defendants. The complainant prays in its bill that the defendants be enjoined from employing or using the name "Kitchen Cleanser" in connection with their said cleaning preparation on any label, advertisement, etc., and that the defendants account to the complainant for the amount of such cleaning preparation sold by reason of the alleged unlawful marketing, labeling and advertising of such preparation.

A demurrer was filed to the bill of complaint, which was overruled by the court, and the defendants filed separate answers. The defendant M. M. Culhane answered denying all knowledge of the matters and things referred to in the bill of complaint, and denying that he had any interest or connection whatever with any business carried on by John M. Culhane.

In the separate answer of John M. Culhane it was denied, inter alia, that the public and trade in general acquiesced in any alleged exclusive right of complainant to use the words claimed by them for the said preparation, and he further alleged that such words and similar words had been used by other manufacturers and the trade generally to designate and describe similar preparations which are well adapted to serve the purposes of kitchen cleansers. This defendant further denied that the complainant had been injured in any sum by reason of any act or omission on his

Testimony taken and returned to court on the day of the  
said case, witness of course, in connection with the same  
and testimony said by them, and that by the same day,  
the testimony, will show the complaint given and its  
results; that complaint has suffered damage  
to the extent of more than \$5,000 by reason of the alleged  
misconduct of the defendant, the complaint given in  
the bill that the defendant has collected from receiving an  
undue sum of money in connection with their  
and criminal preparation on any label, advertisement,  
and that the defendant intended to the complaint  
for the amount of such alleged preparation said by reason  
of the alleged criminal conduct, labeled and advertised  
and of such preparation.

A defendant was filed in the bill of complaint,  
action was verified by the words, and the defendant filed  
an answer thereto. The defendant, J. L. Wilson answered  
that all included by the complaint and claims referred to  
in the bill of complaint, and that the defendant had no  
interest or connection whatever with the business carried on  
by John L. Wilson.

In the separate answer of John L. Wilson it  
was stated, inter alia, that the bill and answer in the  
complaint in any alleged criminal claim of complaint,  
to the words claimed in them for the said preparation,  
and the defendant alleged that such words and similar words had  
been used by other individuals and the claim generally be  
defendant and certain alleged preparation which was well  
known to have the business of Wilson of course. This  
defendant further stated that the complaint had been in-  
duced in not only by reason of any act or omission on the



part, and generally the defendant John E. Culhane denied each and all the material allegations in the bill of complaint.

Trial was had in the Circuit Court of Cook County, and at the close of the hearing the court entered a decree dismissing the bill of complaint. The case is brought here to reverse this decree of the trial court.

The evidence satisfactorily proves that the defendant M. H. Culhane had no connection with or interest in the business owned by his brother, John E. Culhane, and as to him, at least, there can be no question of the correctness of the finding of the trial court.

As proof of the allegations of its bill of complaint the complainant introduced in evidence copies of certain labels and advertisements used by complainant in its business, and also certain other labels and advertisements used and circulated by the defendant, John E. Culhane, in his business. An inspection of the exhibits will show that the labels used by defendant are not well calculated to deceive any person of common intelligence who might desire to purchase the cleaning preparation sold by complainant; they are in no sense similar in either shape, color, design or language, with those used by complainant, and the difference is easily noticeable. The most striking part of the label used by defendant contains the words "Halo Kitchen and Bathroom Cleanser, Manufactured by Halo Chemical Co., Chicago, Ill." The principal section of the advertisements of complainant contains the words "Kitchen Klenzer, copyright 1910, Anti-septic, Cleane-Scours Scrubs-Polishes, made by Fitzpatrick Bros., Chicago." Complainant introduced a copy of a newspaper advertisement of the Adolph Market Co. in which, among many other articles, is advertised a cleanser as follows: "Halo Farlor and Kitchen Cleanser 15¢." In another advertisement



part, and especially the defendant John J. Calhoun, and all the material allegations in the bill of complaint.

There was no issue in the bill of complaint, and at the time of the hearing the court entered a decree dismissing the bill of complaint. The case is brought here to reverse this decree of the trial court.

The witness testifies that the defendant John J. Calhoun has no connection with or interest in the business owned by his father, John J. Calhoun, and as to him, at least, there can be no question of the correctness of the finding of the trial court.

As to the allegations of the bill of complaint, the defendant introduced in evidence copies of certain labels and advertisements used by defendant in its business, and also certain other labels and advertisements used and distributed by the defendant, John J. Calhoun, as his business. An inspection of the exhibits will show that the labels used by defendant are not well calculated to deceive any person of common intelligence and might easily pass for the genuine preparation sold by defendant; that the labels are in no sense like in either shape, color, design or form, with those used by defendant, and the difference is easily noticeable. The same section of the label used by defendant contains the words "John J. Calhoun and Son," whereas, as shown by the labels introduced by the defendant, the words "John J. Calhoun, Jr." are used. The principal section of the advertisements of defendant contains the words "John J. Calhoun, Jr., sole agent, of various goods," whereas, as shown by the labels introduced by the defendant, a copy of a newspaper advertisement of the defendant John J. Calhoun, Jr., is introduced, which is advertised as a business as follows: "John J. Calhoun and Son, sole agent, of various goods." In another advertisement

by the same company an article described as "Halo Kitchen and Bathroom Cleanser" also appears.

The evidence taken at the trial tends to prove that the word "cleanser" as part of a name used in connection with preparations adapted to household cleaning purposes was used by manufacturers and dealers other than complainant for many years prior to the adoption by complainant of the trade name "Kitchen Klenzer." On cross-examination Mr. Fitzpatrick, president of the complainant corporation, testified that there were on the market other cleansers, and specified as an instance of the use of such words in the trade the fact that a cleaning preparation could be bought in the market known as "Dutch Cleanser." From an examination of the evidence it may be concluded that the defendant has not unfairly or unlawfully copied the advertising matter, the trade-mark or trade name used by the complainant in its business. As stated, the advertising matter used by the defendant is not at all similar to nor does it resemble that used by the complainant.

The bill of complaint alleges that the defendant has used the words "Kitchen Cleanser" as a trade name for the preparation sold by him in the market. The evidence does not support this allegation. The exhibits admitted in evidence show that the words used in the name adopted by defendant are, "Halo Kitchen and Bathroom Cleanser." Is the use of the name "Halo Kitchen and Bathroom Cleanser" calculated to be confused with the trade name "Kitchen Klenzer" adopted by complainant? We think not. A person of ordinary intelligence would not be misled or confused by the use of either or both of these names. Assuming, however, that the complainant is right in





its contention that the defendant has in fact used the words "Kitchen Cleanser" as a trade name for his cleaning preparation, would the use of such name constitute an unfair and illegal infringement upon the trade name "Kitchen Klenzer" which was adopted by complainant?

In Ball v. Siegel, 116 Ill. 137, the controversy arose over the use of the names "Ball's Health-preserving Corsets" and "Dr. Schilling's Health-preserving Corset." Deciding the case, the court said: "The words, 'health-preserving,' preceding the word, 'corset,' beyond all question but describe a quality of the corset, - i. e., an effect which its use will produce, - and cannot, therefore, be employed as a trade mark." And so here, it may reasonably be held that the words "kitchen cleanser" but describe an article adapted for a particular use or purpose; the name is definitely descriptive of the service which it is claimed may be performed by the preparations of the parties to the suit, i. e., that of kitchen and house cleaning.

It is not claimed or proved that the defendant here has adopted the form of letters or spelling used by the complainant. In Ball v. Siegel, supra, the court said:

"Conceding that appellants had a trade mark in the name of 'Ball,' and in the picture and words and form of lettering on the labels pasted on their boxes, it is evident that the name, 'Schilling,' or 'Dr. Schilling,' could not be mistaken for that of 'Ball,' and that if the picture, words and form of lettering on the labels pasted on appellees' boxes were totally unlike those pasted on appellants' boxes, the one could not reasonably be mistaken for the other, and there could, in neither respect, be any infringement of a trade mark. The only question is, whether appellees were, by devices and false representations, as charged in the bill, selling or causing to be sold their corset, when the purchasers were desiring to purchase, and supposed they were purchasing, appellants' corset."

The defendant testified that he always described the preparation manufactured and sold by him by its trade





name, "Halo." There is no evidence in the record from which it can be said that any person had been deceived by the use of the trade name adopted by the defendant. It does appear that certain merchants had sold and had purchased the article made by the defendant as "Kitchen Cleanser," but there is no evidence in the record from which it appears that either such merchants or their customers had been in any way deceived into believing that the defendant's preparation was in fact that of the complainant.

It is our opinion that the words used by the defendant were not calculated in any way to infringe upon the rights of the complainant. In doing its business and in adopting a name to describe its article, the complainant has seen fit to employ a name of an ordinary descriptive character. This the law says it cannot do in such manner as to exclude others from using in business the same descriptive words. It would serve no useful purpose to cite authorities on this question; they are numerous, and practically unanimous in the holding that a privilege in the exclusive use of descriptive words cannot in any manner legally be acquired.

In a recent English case, decided by the House of Lords November 30, 1916, on appeal from the Court of Appeal (32, The Times L. R., 311). it was held that the term "malted milk" was a descriptive designation, and that the plaintiffs, who manufactured and sold a preparation known as "Horlick's Malted Milk," were not entitled to restrain the defendant from manufacturing and selling a similar preparation under the name "Hedley's Malted Milk."

The decree of the Circuit Court should be affirmed for the reasons: First, that the defendant has not in fact adopted the words "Kitchen Cleanser" as a trade name for the preparation sold by him; second, that even if it

There is no evidence in the record that the  
 it can be said that any person had been deceived by the law  
 of the trade name adopted by the defendant. It is not  
 that certain materials had with and purchased the articles  
 made by the defendant as "Lipton's Creamery", but there is no  
 evidence in the record that it is shown that almost every  
 merchant or retail customer had been in any way deceived  
 into believing that the defendant's presentation was in fact  
 that of the defendant.

It is not shown that the words used by the de-  
 fendant were not calculated in any way to induce such the  
 truth of the defendant. In using the words and in  
 making a name so similar to the article, the defendant has  
 been in the way of an ordinary descriptive character.  
 This has been the case as it seems to be to induce  
 others from using the words and more descriptive words.  
 It will serve no useful purpose to the defendant in this  
 question; that the defendant, and especially business in  
 the country such a privilege is the exclusive use of descriptive  
 words cannot be any longer subject to copyright.

In a recent opinion case, decided in the court  
 of the District of Columbia, the court said that the right of ap-  
 propriation of a name is not a right of property, and that the  
 "Lipton's Creamery" was a descriptive designation, and that the  
 defendant, who had purchased and sold a considerable number  
 of "Lipton's Creamery" articles, was not entitled to a  
 permanent right of appropriation and to use a similar  
 designation when the name "Lipton's Creamery" was used.  
 The court of the District of Columbia should be  
 bound by the decision. First, and the defendant has not  
 in fact adopted the name "Lipton's Creamery" as a trade  
 name for the defendant's articles; second, that word is

be conceded that the defendant had made use of such words as a trade name, such name and the words that go to form it are so definitely descriptive in character as that the defendant would have a clear right to use the same, notwithstanding the use by complainant of the name adopted by it; third, the evidence does not disclose that the defendant attempted to or that he did deceive the public in the sale of the preparation made by him or that he did by the use of any labels, trade-marks or advertising matter lead purchasers into the belief that such preparation was the article dealt in by the complainant.

The decree of the Circuit Court will be affirmed.

**AFFIRMED.**



be considered that the defendant had been told by such person  
as a third person, who knew the victim, that he was in  
the vicinity of the victim in connection with the case.  
The defendant would have a clear right to see the case, and  
the use of the defendant of the case should be  
first, the evidence has not disclosed that the defendant  
attempted to do that he did because the people in the case  
of the defendant were by him or that he did by the use  
of any force, fraud, or any other means to  
obtain from the victim any such property and the  
defendant in the complaint.  
The matter of the victim's death will be affirmed.  
REVEREND.

JAMES F. BISHOP, Administrator  
of the Estate of Carl O. Wiberg,  
deceased,

Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,  
Defendant in Error.

ERROR TO CIRCUIT COURT,  
COOK COUNTY.

204 I.A. 205

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his declaration in the Circuit Court of Cook County, alleging therein that the defendant, Chicago Railways Company, on August 25, 1912, while in possession of a certain street car, and while plaintiff's intestate with due care was walking upon and along Milwaukee avenue, at or near its intersection with Lowell avenue, in Chicago, through its, defendant's, servants, negligently ran said car into plaintiff's intestate, thereby injuring him, from the effects of which injury he died.

The case was tried by a jury, and at the close of plaintiff's case the court directed the jury to find the issues for the defendant. The jury, as directed, rendered a verdict finding the defendant not guilty. Judgment was entered on this verdict, and the plaintiff brings the case here by writ of error for review.

Milwaukee avenue extends in a northwesterly and southeasterly direction through the northwest section of the city of Chicago. A short distance south of where the accident happened Milwaukee avenue is intersected by Addison street, which extends east and west, and Milwaukee avenue is again intersected by Lowell avenue, a north and south street,

James W. Hickey, Administrator  
of the Bureau of Civil Service  
Investigation

Resident in New York

NY.

CHICAGO RAILWAY COMPANY,  
Defendant in Error.

ORDER TO SHOW CAUSE  
ORDER FOR JURY.

20411102

THE CHICAGO RAILWAY COMPANY, Defendant in Error.

Plaintiff filed his declaration in the Circuit Court of Cook County, Illinois, on August 22, 1912, with in Chicago Railway Company, on August 22, 1912, with in connection of a certain street car, and with Plaintiff's interest with the fact was waiting upon and along with interest, as or over the intersection with Lowell Avenue, in Chicago, through the defendant's negligence, negligently and with care into Plaintiff's premises, thereby injuring him, from the effects of which injury he died.

The case was tried by a jury, and at the time of Plaintiff's case the court directed the jury to find the issues for the defendant. The jury, as directed, rendered a verdict finding the defendant not guilty. Judgment was entered on this verdict, and the Plaintiff brings the case here by writ of error for review.

Plaintiff's evidence consists in a photograph and contemporaneous direction through the defendant's agent at the City of Chicago. A short distance south of where the most direct highway between Avenue is intersected by Addison Avenue, which extends east and west, and Illinois Avenue is again intersected by Lowell Avenue, a north and south street,

at a point a short distance north of the place where the accident occurred. According to the testimony of plaintiff's witnesses the accident happened on Milwaukee avenue about half way between Addison street and Lowell avenue, which two latter streets intersect Milwaukee avenue at points between 400 and 500 feet apart.

For the plaintiff Mrs. Carolina Mittag testified that she was riding on the car which struck deceased; that the car was bound northwest; that she first saw the deceased when he "flew across from the car, in front of the car. I was on the right side of the car, facing north on Milwaukee avenue. The first thing I seen the man flying, after the car was going past Addison street. I seen the man flying in front of the car, and flying across over to the curbstone on Milwaukee avenue; it was just about half a block west of Addison avenue, I think. The car went about 40 or 50 feet after it struck him. I did not hear any bell or any whistle or anything sounded on the car up to the time the man was struck. The last street the car crossed was Addison. The street ahead of that is Lowell avenue, which is northwest of Addison. There is a high school right on the right side of Milwaukee avenue."

On behalf of the plaintiff Adolph Mittag, husband of the witness Carolina Mittag, testified that he was riding on the right side of the front platform of the car. "I was going northwest. I was the only one besides the motorman. I saw that the car hit the man; he was about five or six feet ahead of the car, and then he crossed; the right side of the car hit him. I did not see him before the car struck him; I saw him just when the car struck him. I was looking north when the car struck him. There was one automobile after another after the man was struck and before. I



at a point a short distance north of the bridge where the accident occurred. According to the testimony of Plaintiff's witnesses the accident happened on Highway Avenue about half way between Adams Street and Lowell Avenue, about the last street intersection Highway Avenue at Point Bridge and the foot bridge.

For the Plaintiff's testimony, Plaintiff's testimony is that she was riding on the car which struck defendant; that she was facing westward; that she first saw the defendant when he flew across from the car, in front of the car. I was on the right side of the car, facing north on Highway Avenue. The first thing I saw was him lying, after the car was going very fast. I saw the car lying in front of him and, and lying across over in the roadway on Highway Avenue; it was just about half a block west of the street corner, I think. The car went about 40 or 50 feet after it struck him. I did not hear any fall or any collision or anything recorded on the car or in the car and the car was broken. The last street the car crossed was Highway. The car was about half way to Lowell Avenue, which is northwest of Adams. There is a sign across on the right side of Highway Avenue. On the right of the Plaintiff's testimony, she said at the witness Highway Avenue, testified that he was riding on the right side of the foot bridge of the car. "I was going westward. I was the only one heading the westward. I saw that the car hit him and; it was about 150 or six feet ahead of the car, and then he struck; the first side of the car hit him. I did not see him before the car struck him; I saw him just when the car struck him. I was looking north when the car struck him. There was no witness after accident other than the street and before. I

saw an automobile coming there about the time the man was struck; I couldn't tell how near to the man it was. I saw an automobile pass after the man was struck. The car that I was on at the time went general speed, about 18 or 20 miles, just before and at the time of the accident; I couldn't say exactly. The speed of the car did not change from the time it left Addison until the man was struck." This witness testified that he was well acquainted with the neighborhood and that it was "very thinly settled." He further testified that the deceased was struck some time after four o'clock in the afternoon, and that the day was clear and bright; that he was a witness at the coroner's inquest, at which time he testified that he saw the man "jumping over the tracks as quick as he could. \* \* Just running right in front of the car. At that time he was four or five feet in front of the car. The right hand corner of the car caught him."

Charles Schroeder and A. W. Heggie were also called and testified on behalf of the plaintiff. Their testimony as to what occurred at the moment of the accident was substantially the same as that of the two witnesses referred to. Heggie testified that "the car was going, when it reached Addison avenue, I should judge 22 to 25 miles an hour. At the time of the accident it could not be much less, about 18 or 20 miles; just as soon as he put the air brake on it started to go slower. The air brake was put on before the accident. When the motorman saw the man he was, I should judge, about 100 feet, when he turned off the power, and about 75 feet when he put on the air brake, somewhere in there. I saw the man before he was hit. He was on the south track. He was going north crossing Milwaukee avenue north. He was on the south track - the eastbound track. He was going along naturally, and then he stopped. He was facing





north when he was walking, then he faced northwest. When I saw him on that track the car was about 200 feet away from him, I should judge. He was walking, and stopped about that time, stopped right in about the middle of the south track. I saw an automobile, it was quite a ways west of him, I should judge three or four hundred feet; it was coming southeast. The car was going northwest. When he stopped, the automobile was about 300 feet from him. The car was about the same distance, I should judge. I noticed him start up again. When he started up again the automobile was just pulling out and was almost by him, just pulling out; when the automobile was coming it had two wheels in the south part of the south or east bound track, and the other two were out towards the curb. That automobile was going pretty fast." This witness also testified that when deceased started to go across the track again the automobile was going by him, that it pulled out towards the curb; that "as soon as the man started to cross the track the motorman sounded the bell. The car was then about 75 or 100 feet from the man."

From the testimony of the plaintiff's own witnesses it is quite clear that deceased had attempted to cross Milwaukee avenue at the point where the accident occurred, and about midway between Lowell avenue and Addison street; that he had ample opportunity to observe whatever vehicles were moving in either direction upon Milwaukee avenue. The day was clear, and there were no obstructions, so far as the evidence shows, which in any way limited his view along the street. From the evidence admitted upon the trial it appears that deceased became aware of the fact that an automobile was approaching at a high rate of speed from the northwest, and that in order to avoid being struck by the automobile the deceased suddenly attempted to cross the north tracks on the street. The wit-





nesses for the plaintiff all seem to agree that deceased moved quickly and that he was struck by the right corner, that is, the northeast corner of the street car as it was moving on the north tracks in a northwesterly direction. The accident did not happen at a street intersection or crosswalk.

Some of the witnesses for the plaintiff testified that they did not hear any bell sounded or warning of any sort given before the accident happened; other witnesses for the plaintiff testified that a bell was rung and that the motorman of the car made some attempt to stop it before it struck deceased. There is evidence in the record which tends to prove that deceased's senses of sight and hearing were normal.

In Pendleton v. C. C. Ry. Co., 120 Ill. App. 405, it was held that "contributory negligence on the part of a person injured does not relieve the party inflicting the injury from liability, if by the exercise of ordinary care after discovering the danger (to the person injured) the accident could have been prevented, in other words, if the party has been guilty of wilful and wanton conduct; or if such party has been thus guilty in failing to discover the danger through recklessness or carelessness when the exercise of ordinary care would have discovered the danger and averted the calamity." The principle enunciated in this authority is supported by Swanson v. C. C. Ry. Co., 242 Ill. 388, and Chicago & West Division Ry. Co. v. Ryan, 131 Ill. 474.

There is evidence in this record from which it may be assumed that the motorman did in fact see the deceased as he stood upon the tracks when the street car was some distance southeast of the place where the accident oc-

needed for the plaintiff's case. It seems to me that the evidence  
presented in this case is not sufficient to establish the  
fact that the defendant was in a position to prevent the  
moving of the goods from the warehouse to the street. The  
evidence is not sufficient to establish the fact that the  
defendant was in a position to prevent the moving of the  
goods from the warehouse to the street.

Some of the evidence for the plaintiff is  
that the goods were not moved from the warehouse to the  
street until after the plaintiff had given notice to the  
defendant. The plaintiff testified that a call was made  
and that the defendant of the warehouse refused to help  
it. It is also testified that the goods were moved to the  
street after the plaintiff had given notice to the defendant  
that the goods were to be moved. There is evidence in the  
case that the defendant was in a position to prevent the  
moving of the goods from the warehouse to the street.

In re the Goods of the Plaintiff  
It is also testified that the plaintiff had given notice to the  
defendant that the goods were to be moved. The plaintiff  
testified that the defendant refused to help. It is also  
testified that the goods were moved to the street after the  
plaintiff had given notice to the defendant. The plaintiff  
testified that the defendant was in a position to prevent the  
moving of the goods from the warehouse to the street. The  
evidence is not sufficient to establish the fact that the  
defendant was in a position to prevent the moving of the  
goods from the warehouse to the street. The evidence is not  
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goods from the warehouse to the street.



curred. We do not believe, however, that this fact in and of itself renders the defendant legally liable for the death of plaintiff's intestate, irrespective of his own contributory negligence. Whatever may be said about the conduct of the motorman, or whether it be said that he was or was not guilty of any negligence at the time the accident happened, there was no evidence taken at the trial from which it could fairly be presumed that the deceased would, under the circumstances existing at and just before the time of the accident, attempt, as one of plaintiff's witnesses put it, to fly across the street in front of the approaching street car. Had this accident occurred at a street intersection or at or near a crosswalk, a somewhat different case would be presented. Under the circumstances, as they were disclosed to the motorman as the car approached the point where deceased had placed himself upon the tracks, the motorman was justified in his evident assumption that the deceased would not recklessly run in front of the moving street car.

In Wabash R. R. Co. v. Spear, 156 Ill. 244, the court said: "It is well settled that where the injury results from the reckless, wilful or wanton act of the defendant, the plaintiff's right to recover will not be defeated by his mere negligence, however great."

In Pendleton v. C. C. Ry. Co., supra, relied upon by counsel for plaintiff, it appears that the gripman on the train which caused the injury to plaintiff in that case "shouted to appellant, who thereupon threw up his hands, seemed frightened and immediately commenced to retrace his steps," starting back easterly across the east track."

In Swanson v. C. C. Ry. Co., supra, the evidence disclosed that the conductor of a stalled cable train knew that





a crowd of young school boys had collected around it, and the court held that it was the duty of the conductor to exercise ordinary care to see that these boys were not injured by the starting of the train.

In the case of Chicago & West Division Ry. Co. v. Ryan, supra, also relied upon by plaintiff, the person injured was an infant not quite 17 months old, so young in fact that it was incapable of exercising care and could not be charged with negligence.

In the case at bar it does not appear that the deceased had placed himself in such position of danger as that the conduct of the motorman on the car which struck him could be held to be a reckless and wanton disregard of the safety of deceased. The automobile which it is claimed was approaching the deceased from the northwest, partly in the southbound tracks, turned out of the tracks and toward the curb on the southeast side of Milwaukee avenue as it passed the place where deceased was standing. The evidence discloses that he could have stood with perfect safety to himself southwest of the northbound track until the street car had passed, but he chose, without any warning to the motorman, to suddenly run in front of the approaching car.

In C. M. & St. P. Ry. Co. v. Halsey, 133 Ill. 248, the court said: "One who, failing to observe due care, blindly walks into a danger that the observance of due care would have enabled him to avoid, is no less guilty of contributory negligence than he who, by the observance of due care could extricate himself from the danger."

There is really no dispute as to the facts of this case. Heggie, the only witness who seems to have seen the deceased from the moment when he attempted to cross the





northbound tracks, testified that deceased started to go across the tracks when the automobile had just about passed him, the street car being then about 100 or 125 feet away from him; that deceased then started walking north, facing in that direction, but that he had previously been facing west, and that he was struck when he was just about at the north rail of the westbound track; that as soon as he started to cross the track the motorman started to sound the gong, the car then being 75 or 100 feet away from deceased; that from the time that he, the witness, realized that deceased was in danger the motorman was very busy "doing everything that he could to stop that car from the moment that the man appeared to be in danger."

The case of Roberts v. C. C. Ry. Co., 262 Ill. 228, is in its effect and in principle much like the case at bar. In deciding this case the court said:

"The evidence, in the light most favorable to the plaintiff, with all the inferences that could be legitimately drawn from it, did not tend to prove any fault or neglect on the part of the defendant or the exercise of ordinary care on the part of Smith. The question whether Smith exercised ordinary care is to be determined, not by the probabilities when he left the sidewalk, but rather by the situation when he reached the tracks and attempted to cross between the approaching cars when the street was clear and there was no obstruction to the view and no necessity for making the attempt. The evidence established that Smith misjudged his ability to cross the two tracks between the approaching cars, and on account of his error of judgment, for which no one else could be held responsible, he lost his life. Smith could see both cars and the entire situation was open before him. He was not on any crossing for pedestrians and needed no warning or signal that the two cars were approaching each other, - a fact that no one could fail to observe. The evidence raised no issue of fact proper to be submitted to a jury, and the court erred in not directing the verdict."

We are of the opinion that the deceased attempted to cross the tracks in front of the approaching street car when it was too close to him to permit him to do so with safety to himself. It is conceded that the day was clear;





that the deceased was an adult, 33 years of age; that his senses of sight and hearing were good, that there was no obstruction to his view, and nothing of any nature intervened to prevent him from protecting himself by the exercise of very slight care.

It is without doubt true, as insisted and as held in C. C. Ry. Co. v. Sandusky, 198 Ill. 400, that "attempting to cross the track of a street railway ahead of a moving car is not necessarily to be imputed as contributory negligence. It may or may not be prudent, depending upon the proximity of the car and the speed with which it is moving."

The deceased stepped in front of the car of defendant at a time when ordinary prudence should have warned him that death or injury was almost certain to result from his act, and that being the case he must be held to have been guilty of negligence which proximately contributed to his death.

In deciding the case of South Chicago City Ry. Co. v. Kinnare, 96 Ill. App. 210, the court said:

"If a person is seen upon the tracks, or near thereto, and is apparently capable of taking care of himself, while the motorman should give warning by sounding his gong, having done so, he may assume that such person will leave the track before the car reaches him, so long as the danger of injuring him does not become imminent, and no longer, but this presumption can not be indulged in with reference to children too young to appreciate the danger, nor with regard to those who appear to be in a peril from which they are unable to extricate themselves."

It is insisted by defendant that the evidence admitted on the trial does not tend to prove that the defendant was guilty of any negligence which caused the death of deceased. It is unnecessary for us to pass upon this question for the reason that we are of the opinion that the deceased was guilty of such contributory negli-





gence as precludes plaintiff from recovering a judgment against the defendant in this suit.

The court admitted in evidence at the trial the verdict of a coroner's jury returned in an inquisition taken for the people of the state of Illinois on view of the body of the deceased, but in doing so it excluded from the jury that part of the coroner's verdict which is as follows: "The jury finds this accident could have been avoided had the motorman exercised greater care." The ruling of the trial court on this question was correct. The language of the excluded part of the verdict indicates an attempt on the part of the coroner's jury to fix a civil liability, and this under the law it had no power to do. The language referred to was properly regarded as surplusage, and the court rightfully excluded it from the jury.

"It is not within the province of the coroner's jury to fix the civil liability of anyone growing out of an accident resulting in the death of an injured person, except in so far as the finding required by the statute to be made may have such effect. It was not proper for the jury empaneled at this inquest to inquire whether the street railway company or anyone else was legally liable to respond in damages because of the death of Samuel Novitsky. The finding in the verdict that, from the evidence introduced, had the street railway company not blockaded the tracks with cars on both sides of the street crossing the accident would not have occurred and deceased would not have lost his life, and the censure of the street railway company, are mere surplusage, and it was not proper to admit the verdict in evidence with those portions included." Novitsky v. Knickerbocker Ice Co., 276 Ill. 102, 108 (advance sheets January 10, 1917).

The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.



There are numerous points in the evidence...

...the defendant in this case.

The court ruled in evidence at the trial.

The verdict of a coroner's jury returned in no localities... taken for the people of the State of Illinois on view of the

body of the deceased, and in doing so is required from the... jury that part of the coroner's verdict which is as follows:

"The jury finds this defendant guilty of having caused the

and witness examined previous case." The finding of the

jury that in this case was correct. The language of

the verdict was at the verdict indicated an attempt to

the part of the coroner's jury to find a civil liability, and

this under the law it had no power to do. The language of

the jury is not properly regarded as authoritative, and the court

therefore concluded in favor of the jury.

"It is not within the province of the coroner's... jury to find the civil liability of anyone causing death or... as indicated previously in the fact of an injured person... except in the case of a finding returned by the coroner... in the case of a death. It was not proper for... the jury to find of this nature as indicated above. The... stated that the jury or anyone else was liable for... to return in the verdict because of the death of a person... testimony. The finding in the verdict does, from the... evidence indicated, and the coroner's jury not... indicated the verdict with the words of the... stated that the coroner's jury had not returned the... indicated that the jury had not returned the... the first jury company, and more witnesses, and it... was not proper to admit the verdict in evidence with... from the jury. The jury's verdict is not... 1891, 1892, 1893, and 1894 (evidence taken in 1891).

The judgment of the Circuit Court of Cook

County will be affirmed.

... ..

ARTHUR WAGNER COMPANY,  
a corporation,  
Defendant in Error.

vs.

GALLAHER & SPECK, a  
corporation,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 206

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff left with defendant a Bullock generator and a switchboard for the same, for storage for a stated period of four months at an agreed compensation of \$10. The contract is in writing and contains this provision: "You are to allow no person to remove apparatus or parts from same without written permission from ourselves" - the plaintiff. The apparatus was removed bodily with the consent of defendant but without any order, written or verbal, from plaintiff or any of its officers. The apparatus was thereby lost to plaintiff. The cause was tried before the court by agreement of the parties and a finding and judgment in favor of plaintiff for \$600 resulted, and defendant sues out this writ of error and asks a reversal.

The relation of the parties to each other was that of bailor and bailee, and the law of bailments governs the rights and liabilities of the parties. It is contended that the contract was ultra vires the chartered powers of defendant. With this contention we do not agree. We think it may be fairly said that the contract of plaintiff, if not within any express right conferred by its charter, was nevertheless incident to the powers expressly granted. The reasoning in Chicago Building Society v. Crowell, 65 Ill. 453, is pertinent to the facts in this record.





The action is in tort, and under the ruling in Chicago General Ry. Co. v. Chicago City Ry. Co., 87 Ill. App. 17, the defense of ultra vires is not open to defendant. In passing upon this question the court said:

"There are also numerous cases that corporations can not shield themselves for a tort committed in the prosecution of their business by a claim that the acts were ultra vires. The doctrine of ultra vires has no application in such cases and affords no defense."

As this cause must be again tried, we do not pass upon the weight of the evidence.

There is a vital defect in plaintiff's statement of claim and the proofs given in support thereof. It is averred in the statement as follows:

"Plaintiff further avers that by reason of negligence, carelessness and misdelivery by the defendant, the generator has become wholly lost to plaintiff, and that the fair, reasonable market value was and is of an amount not less than \$600, wherefore plaintiff prays judgment in the sum of \$600."

The difficulty with this averment is patent. It fails to state any value of the lost property. A statement that the fair, reasonable market value was and is of an amount not less than \$600 does not state any value. While this might have been a sufficient statement of value to support a pleading, if evidence of it were in the record, there being no evidence of value and the averment in the statement of claim fixing none, there was no basis upon which the court could find the value of the property. Had plaintiff averred the value of the property in its statement of claim and had such averment remained undenied by defendant, it would not have been necessary to have proffered evidence to support the averment, as, if it was undenied it would, under rule 19 of the Municipal Court, which appears in the record, have stood as an admitted fact. Leonard v. U. P. R. Co., 180 Ill. App. 415.



The parties in this case, and under the ruling in  
Chicago Street Ry. Co. v. Chicago City Ry. Co., 107 Ill. 407.

17. The defense of ultra vires is not open to defendant.

In passing upon this question the court said:

"There are also numerous cases that establish  
 that one may maintain themselves for a tort committed in the  
 prosecution of their business by a claim that the act  
 was ultra vires. The doctrine of ultra vires has no ap-  
 plication in such cases and will be no defense."

As this court must be guided by this, we do not

pass upon the weight of the evidence.

There is a vital defect in defendant's statement

of claim and the proofs given in support thereof. It is

averred in the statement as follows:

"Defendant further states that by reason of mis-  
 management, carelessness and misdeeds by the defendant,  
 the plaintiff has become wholly lost in plaintiff, and  
 that the fair, reasonable market value was and is of an  
 amount not less than \$100,000. Defendant plaintiff prays  
 judgment to the sum of \$100,000."

The difficulty with this statement is obvious. It fails to  
 state any value of the lost property. It is impossible that the  
 fair, reasonable market value was and is of an amount not  
 less than \$100,000 and not more than \$100,000. While some might  
 have seen a sufficient statement of value to support a claim-  
 ing, if evidence of it were in the record, there being no evi-  
 dence of value and the statement is the statement of claim.  
 Fixing same, there was no basis upon which the court could  
 find the value of the property. And plaintiff averred the  
 value of the property in the statement of claim and had such  
 statement remained undisturbed by defendant, it would not have  
 been necessary to have proffered evidence to support the  
 statement, for, if it was undisturbed it would, under rule 16  
 of the amended code, which appears in the record, be  
 taken as an admitted fact. Lawrence v. E. J. E., 100  
 Ill. App. 415.

As there is nothing in the pleadings or proofs of plaintiff establishing the value of the property, the subject-matter of the suit, the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

It is there is no doubt in the minds of those

of scientific standing the value of the property, the  
subject-matter of the suit, the judgment of the court  
is reversed and the cause is remanded to that court

for a new trial.

REVEREND AND HONORABLE

BARNEY VARNEY,  
Appellee.

vs.

AJAX FORGE COMPANY,  
Appellant.

APPEAL FROM THE CIRCUIT COURT  
OF COOK COUNTY.

204 I.A. 208

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

Defendant prosecutes this appeal in an effort to reverse a judgment of \$10,000 entered upon the verdict of a jury as compensation for personal injuries suffered by plaintiff while in the employ of defendant and engaged in his usual duties as such employee.

No question of contributory negligence, fellow servant, or assumed risk is here involved. The action is brought under the Workmen's Compensation Act in force May 1, 1912, and plaintiff relies on the exception clause of Sec. 3 of the Act to maintain the suit.

The declaration consists of one count and charges inter alia that the planer upon which plaintiff was injured was a dangerous machine; that it was practicable and feasible to guard, fence and safeguard it; that certain elective officers of defendant well knew of the unprotected and unfenced condition and that it was practicable and feasible to fence and protect it, and also knew of the danger to plaintiff by reason of its unprotected condition, and charged that defendant's elective officers intentionally omitted to safeguard, protect, and fence the planer.

Defendant interposed to this declaration the plea of the general issue and two special pleas setting forth facts precluding the common law right of action, averring that both parties were within the "Compensation Act", and negating any





intentional omission on the part of any elective officer to guard the planer, etc. To these special pleas plaintiff demurred generally. The demurrer was on a hearing overruled; plaintiff took leave to reply double to the special pleas, but instead of doing so filed a replication in the nature of a similiter to the two special pleas. These pleas did not conclude to the country, but with a verification. The replications filed were not responsive in any way to the pleas and joined no issue thereon. Defendant now urges this error as ground for reversal, but it comes too late to avail of the objection. While in the unsettled condition of the issue on these pleas defendant could not against its objection have been forced to trial and might have moved for a judgment upon these special pleas, as one plea stating a good defense to the whole declaration is, without a replication, tantamount to a confession of the verity of the matters pleaded in defense entitling a defendant to a judgment on such plea; still, in going to trial without objection or the making of any such motion, the subsequent verdict cured this irregularity in procedure. Ferguson v. White Oak Coal Co., Gen. No. 22470 in this court, not yet reported; Ward v. Stout, 32 Ill. 399; Wende v. Chicago City Ry. Co., 271 *ibid* 437; Lowenstein v. Franklin Life Insurance Co., 122 Ill. App. 632; Miles v. Danforth, 37 Ill. 157; Bissell v. City of Kankakee, 64 *ibid* 249; People v. Opera House Company, 249 *ibid* 106; People v. Bug, etc., 189 *ibid* 55; Adams v. Bruner, 152 Ill. App. 123; LaMonte v. Kent, 163 *ibid* 1. An objection to the pleadings cannot for the first time be advantaged of on appeal. Defendant by going to trial on the pleadings as they were, without objection, waives the patent irregularity. Sargent v. Baublis, 215 Ill. 428; Adams v. Crown Coal & Tow Co., 198 *ibid* 445. In First National Bank v.





Miller, 235 Ill. 135, it was held that "the law is settled that if parties go on with the trial without formally joining issue, this irregularity is waived after verdict."

Plaintiff sustained the injury complained about while working on a planer in defendant's factory. He was caught between a projecting screw called a "dog" and a shifting lever on the moving bed of the planer, and his injuries were of such a serious nature that he suffered an amputation of his left leg near the hip.

It is not disputed that plaintiff suffered the injury set out in his declaration, or that the injury happened to him while he was working about his ordinary duties as the servant of defendant, in the course of his ordinary and usual employment. Nor is it complained that the amount of the recovery is excessive. Defendant denies its liability in toto and argues first, that it did not violate the dangerous machinery and safety appliance act, which requires dangerous power driven machinery to be guarded; second, that there was no intentional omission in not sufficiently guarding the "dog" to which the injury is primarily attributable; and, third, that the duty enjoined by the act was not intentionally violated by any elective officer of defendant.

Section 1 of an Act in force January 1, 1910, entitled "Health and Safety of Employees," being part of Chap. 48, R. S., provides that all power driven machinery, including all screws, planes, projecting set screws or moving parts shall be so located wherever possible as not to be dangerous to employees, or shall be properly enclosed, fenced or otherwise protected. Section 3 of the Workmen's Compensation Act in force May 1, 1912, after restricting the right of action and recovery to the methods and amounts provided in the act, contains this exception:





"Provided, that when the injury to the employe' was caused by the intentional omission of the employer to comply with statutory safety regulations, nothing in this Act shall affect the civil liability of the employer. If the employer is a partnership, such omission must be that of one of the partners thereof, and if a corporation, that of any elective officer thereof."

Upon the effect to be given this exception in the act and its application to the facts regarding the omission to protect the "dog" on the planer being attributable to wilfulness upon the part of any of defendant's elective officers, rests the right of plaintiff to sustain the judgment before us for review. It is contended with much force and some logic that the "dog" on the planer was not dangerous within the meaning and intent of the safety appliance act, and that in the operation of the planers in defendant's factory no such or like accident had ever before occurred; that defendant had taken every precaution to guard against accidents from machinery in its factory, and to that end had engaged the services of a competent and expert mechanic, well informed regarding safety appliances for dangerous machinery, who, after a careful examination of defendant's planers did not suggest any safety protective device or devices for the "dogs" with which they were operated.

We think the facts that the serious injury to plaintiff was inflicted by this mechanical device appertenant to the planer, referred to as a "dog", and that soon after the accident, on diligent search and inquiry, defendant discovered and applied to the planers in its factory an efficient method of protection, so that the "dogs" became harmless and the planers with the "dogs" thereon could be safely operated, stamp the appliance as dangerous. The evidence not only demonstrates that the unprotected "dog" on the planer created a condition of danger to the operator, but that steel shavings upon the floor made it slippery





and intensified the danger to the operator by making his footing insecure. The bed of the planer, the evidence shows, moved back and forth on a 12 inch stroke, making from 25 to 40 strokes a minute, and was driven with tremendous force. The "dog" or screw was fastened on the side of the planer and moved with it to the shifter level with force sufficient to press steel plates against the cutting knives of the planer. It is plain that the operation of the planer with the "dog" unprotected was fraught with danger to the operator if for any reason he failed to escape the "dog" when it came in contact with the shifter lever.

It is also insisted that the State delegated to its factory inspector the power to enforce the provisions of the dangerous machinery act, with authority to inspect plants and to give notice of violations to owners and to prosecute them for any violation of the act. While the powers and duties of the factory inspector may be as broad as claimed, that would not relieve defendant from the duty which the act in question imposes upon the factory owner. In Streeter v. Western Scraper Company, 254 Ill. 244, it was held that the safety appliance act in question imposed the duty absolutely upon the owner to protect dangerous machinery and that a failure to do so could not be excused by the failure of the factory inspector to give notice to the owner. The duty rested upon the owner and was not dependent upon receipt of notice from the factory inspector.

There is evidence that several of the elective officers of defendant were advised as to the requirements of the safety appliance act and the duties devolving upon owners thereunder to protect dangerous machinery. Can it be said that with such knowledge of statutory responsibility and with the further knowledge, fairly imputable to defendant from the evidence, that the "dog" on the planer was dangerous to an



and instructed the driver to the operator to handle the  
control lever. The fact of the driver, the operator  
who, having been told to a 15 inch stroke, waited for  
the 15 inch stroke a minute, and was driven into the  
fence. The "tag" on driver was fastened on the side of the  
fence and went with it to the right level with fence  
evidence to prove each phase against the control lever  
of the driver. It is held that the operation of the driver  
with the "tag" indicated was to be done with control of the  
operator. It for any reason he failed to handle the "tag"  
then it came in contact with the shift lever.  
It is also indicated that the driver waited  
for the factory inspector the power to release the provisions  
of the two-way emergency stop, also authorized to inspect  
the driver and to give notice of violation to the driver and to  
proceed with the any violation of the act. While the  
driver and witness of the factory inspector may be in need  
of a signal, that would not relieve the driver from the duty  
which he had in connection with the factory owner.  
In testimony of the factory inspector, who said, it was  
left that the safety application was in connection with the  
fact that the driver was to protect himself from injury  
and that a failure to do so could not be removed by the mil-  
lins of the factory inspector to give notice to the owner. The  
fact stated that the power was not released upon receipt  
of notice from the factory inspector.  
There is evidence that several of the electric  
officers of defendant were advised as to the provisions of  
the safety application and that the driver existing upon owner  
testimony to protect himself from injury. It is said  
that with such facts the it is reasonably responsibility and with  
the further knowledge, being inadvisable to defendant from the  
evidence, that the "tag" on the driver was fastened to the

operator when unprotected, and that defendant had failed to remedy such condition by complying with the act and suitably protecting the point of danger, will the law not say that such omission of the duty cast upon such officers by the statute was intentional? It seems to us that it must. Intent must be gathered from all the circumstances shown by the evidence. What such evidence proves is for the jury, and as said in Burnes v. Swift, 186 Ill. App. 460: "Circumstances surrounding a transaction might be of such a character as to warrant a jury in finding an intentional omission." In Odin v. Denman, 84 ibid 190, the court say: "Willfulness is as difficult to define as negligence. When a violation of the statute is established, then whether it is a willful violation must be determined by the jury, from all the facts and circumstances of the particular case." Aetitus v. Spring Valley Coal Co., 246 Ill. 38. There is ample evidence in this record sustaining the verdict of the jury, which inferentially found that some elective officer of defendant intentionally omitted to have the "dog" on the planer, the proximate cause of the plaintiff's injuries, protected with a suitable safety appliance.

Defendant criticises some of the instructions to the jury. We think the jury, taking the instructions given as an entirety, was sufficiently and correctly instructed on every essential legal element in the cause. Setting forth in an instruction the language of the statute involved, while discountenanced in some decisions, has not been held reversible error. In the early case of Nox v. Town of Kendall, 97 Ill. 72, such method of instruction was approved. Kellyville Coal Co. v. Strine, 217 ibid 516, is a concurring authority. While in Wing v. Smith, 190 Ill. App. 375, the court did not entirely approve reciting the statute in an

...and that defendant had failed to  
properly such position by comparing with the fact and thereby  
prejudicial the point of view, all the law not was that  
such evidence of the jury could have been given by the  
evidence was insufficient. It seems to me that it must. In-  
fact must be determined from all the circumstances shown by the  
evidence. That such evidence is in the law, and as  
said in United States v. Galt, 100 Ill. 460, 461: "Circumstances  
surrounding a transaction might be of such a character as to  
warrant a jury in finding an intentional act." In People  
v. Galt, 84 Ill. 185, the court says: "Intention is an  
element to be taken as negligence. When a violation of the  
statute is established, then whether it is a willful viola-  
tion must be determined by the jury. From all the facts and  
circumstances of the particular case." People v. Galt  
People v. Galt, 84 Ill. 185, 186. There is no evidence in  
this record establishing the intent of the jury, which in-  
tentionally found that some relative officer of defendant in-  
tentionally failed to have the "bag" on the floor, the  
evidence shows of the plaintiff's injuries, connected with a  
serious injury.

Intentionally violates some of the instructions  
of the jury. In this case, finding the instruction  
given as an offense, not sufficiently and correctly in-  
structed as every essential fact shown in the case, and  
the fact is an instruction the language of the statute in-  
volved, which is contained in some language, has not been  
held reversible error. In the only case of People v. Galt, 84  
Ill. 185, 186, the court of instruction was reversed.  
People v. Galt, 84 Ill. 185, 186. As a consequence  
of this, the People v. Galt, 100 Ill. 460, 461, the  
court did not actually approve reading the statute in an

instruction, it did hold that doing so did not constitute reversible error.

The complaint that the term "proximate cause" in one of the instructions is not sufficiently defined to aid the unprofessional man to understand its meaning, is without force. Had defendant desired a more lucid definition of the term it might have tendered an instruction embodying its view of such definition.

The judgment of the Circuit Court does justice between the parties, under the law, and it is therefore affirmed.

AFFIRMED.



instruction, it is said that being so ill and constantly  
invaluable.

The complaint was the same "physical" nature  
in one of the instructions is not necessarily related to  
all the instructions and is not necessarily related to  
all the instructions. And, of course, it is not possible to  
know of the same it might have been in a different  
instruction. It is not possible to know.

The judgment of the Circuit Court does justice  
between the parties, under the law, and it is therefore  
affirmed.

ATTORNEY.

SOPHIA KARCHER,  
Defendant in Error,

vs.

JOSEPH F. KARCHER,  
Plaintiff in Error.

ERROR TO SUPERIOR COURT  
OF COOK COUNTY.

204 I.A. 210

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for divorce alleging desertion. She also prayed for alimony and solicitor's fees. Defendant having departed for Santa Cruz in the Republic of Mexico, where he was alleged to and did in fact at that time live, personal service upon him could not be obtained and therefore resort was had to service by publication, as in such case is permitted by the statutes of this State. On such service by publication, defendant not appearing either in person or by counsel, a default was taken against him, and on an ex parte trial a decree was on April 25, 1911, entered of record divorcing the parties, of which decree neither party is at the present time complaining. However, in the divorce decree it was ordered that the question of alimony as prayed for in complainant's bill be "reserved for the future consideration of this court." Defendant subsequently returned to the city of Chicago and evidenced his satisfaction with the decree of divorce obtained by complainant during his absence in Mexico, by taking unto himself a new conjugal partner, which action forever sealed the binding force and effect of the divorce decree. On August 12, 1913, complainant, after notice to defendant and by leave of court, filed her petition for an order on defendant to pay her alimony and solicitor's fees. To this petition defendant entered a special appearance attacking the jurisdiction of

ORDER TO SHOW CAUSE  
IN THIS COURT.

THE STATE OF TEXAS,  
COUNTY OF DALLAS.  
vs.  
JAMES V. KAY,  
Defendant in Error.

2041 A 210

THE JUDICIAL BRANCH HAS BEEN THE COURT.

Complaint filed for divorce alleging

desertion. Has also prayed for alimony and solicitor's fees. Defendant having departed for Santa Cruz in the Republic of Mexico, where he was alleged to and in fact at that time live, personal service upon him could not be obtained and therefore resort was had to service by publication, as in such case is permitted by the statutes of this State. On such service by publication, defendant not

appearing either in person or by counsel, a default was taken against him, and on an ex parte trial a decree was on April 26, 1913, entered of record divorcing the parties, of which decree defendant party is at the present time complaining. However, in the divorce decree it was ordered that the question of alimony be turned for in complainant's bill be

"reserved for the future consideration of this court." Defendant subsequently returned to the State of California and obtained his satisfaction with the decree of divorce obtained by complainant during his absence in Mexico, by taking into himself a new conjugal partner, which action further nullified the binding force and effect of the divorce decree. On January 18, 1913, complainant, after notice in defendant and by leave of court, filed her petition for an order of return to pay her alimony and solicitor's fees. To said petition defendant objected - special appearance attending the jurisdiction of



the court to entertain the petition. This petition on October 13, 1913, complainant dismissed. On September 15, 1913, complainant, by leave of court, filed an amended petition seeking an order against defendant for alimony and solicitor's fees and obtained an order for a summons against defendant to appear at the October 1913 term of the court and answer, etc., the amended petition. The summons issued and was personally served on defendant by the Sheriff of Cook County, and in answer to such summons defendant entered his special appearance October 7, 1913, and again challenged the jurisdiction of the court to proceed in the matter of awarding alimony and solicitor's fees and moved to dismiss the amended petition for want of jurisdiction. After a hearing of this motion before the Chancellor it was denied on October 28, 1913, and defendant ordered to answer the amended petition within ten days. Defendant answered, to which answer exceptions were filed and partly sustained, whereupon defendant filed an amended answer, to which complainant filed a replication, and the issue as thus joined was heard by the Chancellor and an allowance of \$30 a month for permanent alimony was decreed. From this alimony decree defendant prayed but did not perfect an appeal. On defendant's initiative the decree for alimony was reduced from \$30 to \$22 a month. On September 20, 1916, defendant was ordered to show cause for failure to pay the alimony ordered, and on the 25th day of the same month he sued out of this court this writ of error, which brings before us for review the questions touching the validity of the proceedings culminating in the alimony decree.

There is really but one question of any importance raised or argued by defendant, and that goes to the jurisdiction of the court to enter, after the lapse of the



the court to maintain the petition. This petition on October 13, 1913, was dismissed. On September 13, 1913, complaint, by leave of court, filed an amended petition seeking an order against defendant for alimony and solicitor's fees and obtained an order for a summary judgment defendant to appear at the October 13th date at the court and report, etc., the amended petition. The summary judgment and was previously served on defendant by the sheriff of Cook County, and in answer to such summary judgment entered his special appearance October 7, 1913, and again affirmed the jurisdiction of the court as proposed in the matter of granting alimony and solicitor's fees and moved to dismiss the amended petition for want of jurisdiction. After a hearing of this motion before the undersigned it was denied on October 28, 1913, and defendant ordered to answer the amended petition within ten days. Defendant answered, to which answer exceptions were filed and partly sustained, whereupon defendant filed an amended answer, to which complaint filed a replication, and was issued an order that a hearing be held by the undersigned and an allowance of \$50 a month for permanent alimony was decreed. From this alimony order defendant prayed but did not perfect an appeal. On defendant's initiative the decree for alimony was reduced from \$50 to \$25 a month. On September 20, 1913, defendant was granted to show cause why he should be ordered, and on the 25th day of the same month he was ordered of this court that writ of error, which order before for review and questions touching the validity of the proceedings culminated in the alimony decree.

There is really but one question to be decided - whether or not the court be ordered, after the filing of the petition, to issue an order for alimony, and that order to the

term at which the decree of divorce was entered, the decree for ~~the~~ alimony which it did.

The jurisdiction of the court to decree alimony is governed by the divorce statute and the decisions of our courts in interpretation of that statute. The decisions in other jurisdictions, where in conflict with the statutes or decisions of our own court, are without force and have no controlling effect. Sec. 18, chap. 40 R. S., title "Divorce," is as follows;

"When a divorce shall be decreed the court may make such order touching the alimony and maintenance of the wife, the care, custody and support of the children or any of them, as, from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; and in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may enforce the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court. And the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper."

It will be seen by the section of the Divorce Act supra that the court may both at and after the term at which the decree of divorce is entered deal with the subjects of alimony, solicitor's fees and the custody and support of the children of the marriage.

While the Chancellor was without jurisdiction to award alimony in the decree for divorce obtained on service by publication, still that in no way abridged the power of the court to reserve the question of alimony and solicitor's fees until such time as an appropriate motion in the divorce cause, after jurisdiction of the person of defendant might be obtained, to proceed to decree alimony. What was decided on this point in Proctor v. Proctor, 215 Ill. 275, was that a decree for alimony and solicitor's fees could not be sustained where defendant had not been personally served or had

fact at which the decree of divorce was entered, the divorce  
for xxx alimony which is due.

The jurisdiction of the court to decree alimony  
is governed by the divorce statute and the decision of our  
courts in interpretation of that statute. The decision in  
other jurisdictions, where in conflict with the statute or  
decisions of our own courts, are without force and have no  
binding effect. See, 10, Chap. 40 A. S., 1913.

"Divorce," is as follows:

"After a divorce shall be decreed the court may  
make such order touching the alimony and maintenance of  
the wife, the care, custody and support of the children  
as may be just, and from the circumstances of the parties  
and the nature of the case shall be fit, reasonable and  
just; and in case the wife be complainant, to order the  
defendant to give reasonable security for such alimony  
and maintenance, or may order the payment of such al-  
imony and maintenance in any other manner consistent with  
the rules and practice of the court. And the court may,  
from time to time, make such alterations  
in the allowance of alimony and maintenance, and the care,  
custody and support of the children, as shall appear  
reasonable and proper."

It will be seen by the action of the divorce

act upon the court may have and after the term of

when the decree of divorce is entered deal with the subject

of alimony, solicitor's fees and the custody and support of

the children of the marriage.

While the Chancellor was without jurisdiction to

decree alimony in the decree for divorce obtained on petition

by respondent, still that in no way obviated the power of

the court to reserve the question of alimony and solicitor's

fees until such time as an appropriate motion in the divorce

cause, after jurisdiction of the person of defendant might be

obtained, be moved to decree alimony. But, was decided in

this point in Frederick v. Frederick, 115 Ill. 475, and that a

decree for alimony and solicitor's fees could not be made

where the defendant had not been personally served or had



not entered his appearance. It therefore has no bearing as an authority in the instant case.

In Lynde v. Lynde, 54 N. J. Equity 473, cited by counsel for defendant, the question was raised as to the want of jurisdiction because the appearance of the defendant had not been entered or personal service or process had on him, and the further fact that the decree did not reserve the right to apply thereafter for alimony when jurisdiction in personam was obtained. In this regard, however, the court admitted an amendment to the decree reserving the question of alimony for the further consideration of the court, which resulted in the allowance of alimony. In a suit afterwards instituted in New York to recover in that jurisdiction the alimony decreed by the New Jersey court, the action of the New Jersey court in allowing the amendment was sustained in force of the due faith and credit clause of the Federal constitution. In Starrett v. Starrett, 132 Ill. App. 315, where the question of the right of the court to order the payment of alimony at a term subsequent to that at which the decree of divorce was entered was in dispute, that question was decided contrary to defendant's contention, the court saying:

"We are of opinion that the settled practice in this State is otherwise. This bill asked for two branches of relief - a divorce, and an allowance for support and maintenance and for solicitor's fees. The prayer for alimony was incidental to the main relief sought. It was entirely in harmony with recognized equity practice to grant a final decree as to the main question, viz: the divorce, and to retain jurisdiction of the incidental matter of alimony till some later date and term for any reason which seemed to the court to justify that course."

The logical result of defendant's contention, if given judicial effect, would be that in a divorce decree granted on service by publication, no alimony could be allowed in such decree or at any time after the lapse of the



not entered his appearance. It therefore was as binding as an authority in the instant case.

In Lynde v. Lynde, 54 N. J. 261, 1917, cited

by counsel for defendant, the question was raised as to the right of jurisdiction because the appearance of the defendant

had not been entered or personal service of process

had on him, and the further fact that the decree did not

reserve the right to apply thereafter for alimony when

jurisdiction in Lynde was obtained. In this regard,

however, the court admitted an amendment to the decree re-

serving the question of alimony for the further considera-

tion of the court, which resulted in the allowance of ali-

mony. In a suit afterwards instituted in New York to re-

cover in that jurisdiction the alimony decreed by the New

Jersey court, the action of the New Jersey court in allow-

ing the amendment was sustained in force of the due faith

and credit clause of the Federal constitution. In Lynde

v. Lynde, 132 Ill. App. 318, where the question of the

right of the court to order the payment of alimony at a later

amendment in that at which the decree of divorce was entered

was in dispute, that question was decided contrary to Lynde

and a conviction, and court saying:

"We are of opinion that the settled practice in this state is otherwise. This will make for two systems of relief - a divorce, and an allowance for support and maintenance and for defendant's fees. The proper law alimony was incidental to the main relief sought. It was not a final decree in the main question, viz: the divorce, nor to retain jurisdiction of the instant matter of alimony. It was later made and paid for by reason which needed to the court to justify any course."

The logical result of defendant's nonappearance,

if given judicial effect, would be that in a divorce decree

entered on service by publication, no alimony could be af-

forded in such decree as at any time after the decree is

term at which the decree of divorce was entered, regardless of the fact that the divorce decree reserved the consideration of the question of alimony to a subsequent term, so that after the term at which the decree was entered on service by publication, no order could be made regarding alimony, and the complaining wife divorced in this way would be barred from ever recovering alimony. Such is not the statute, and no decision of our Supreme Court can be found holding to any such doctrine.

The allowance of alimony is restricted to the divorce suit and cannot be granted in any other action. Consequently complainant, if entitled to alimony, must obtain its allowance in her divorce suit or not at all.

We cannot see any distinction in the statute limiting the power of the court to reserve the question of the allowance of alimony to causes where jurisdiction of the defendant is obtained by personal service, and the barring of such power in those cases where service of the defendant has been had by publication. When the court by service of process or by entry of appearance secures jurisdiction of the defendant in personam, the court may proceed to adjudicate the right of the wife to alimony and in the usual way to enforce its payment at a term subsequent to that at which the decree of divorce was entered. Not only had defendant in this case been personally served with process in the divorce suit on complainant's petition for alimony, but he had also entered his appearance and after the decree for alimony had been entered he voluntarily appeared and invoked the jurisdiction of the court and procured a reduction of the amount of alimony decreed from \$30 to \$22 a month. The decree for alimony as modified on the motion of

...at which the decree of divorce was entered, regardless of the fact that the divorce decree recited the jurisdiction of the court of the question of alimony to a subsequent term, as that after the term at which the decree was entered on service by publication, no order could be made regarding alimony, and the complaining wife divorced in this way could be barred from ever recovering alimony. And is not the statute, and no decision of our supreme court can be found holding to any such doctrine.

The allowance of alimony is restricted to the divorce suit and cannot be granted in any other action. Consequently complainant, if entitled to alimony, must obtain the allowance in her divorce suit or not at all. We cannot see any distinction in the statute limiting the power of the court to reserve the question of the allowance of alimony to cases where jurisdiction of the defendant is obtained by personal service, and the parties of such power in those cases where service of the defendant has been had by publication. When the court by service of process or by entry of appearance obtains jurisdiction of the defendant in any case, the court may proceed to adjudicate the right of the wife to alimony and in the usual way to enforce its payment as a law judgment to that at which the decree of divorce was entered. For this had defendant in this case been personally served with process in the divorce suit on complainant's petition for alimony, not he had also entered his appearance and after the divorce for alimony had been entered he voluntarily appeared and invoked the jurisdiction of the court and procured a resolution of the court of alimony decreed from the court to make. The decree for alimony he sought on the motion of

defendant is the decree now in force on this branch of the divorce suit, and we think that he is now estopped from disputing its validity.

The decree of the Superior Court awarding alimony was entered at a time when the court had jurisdiction of the defendant in personam, and it is binding upon him and is therefore affirmed.

AFFIRMED.



Statement is the source now in force of this branch of the  
divorce suit, and he claims that he is now separated from  
disregarding his wife.

The father of the daughter could maintain  
himself and mother at a time when the court had jurisdiction  
of the defendant in personam, and he is claiming upon him and  
is therefore entitled.

Attorney.

PORTER, FISHBACK AND COMPANY, )  
Appellee, )

vs. )

RALPH L. PECK, )  
Appellant. )

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 211

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

The parties to this litigation are landlord and tenant. The suit is for rent and other charges claimed to be due under a written lease between the parties, and relates to office accommodations furnished defendant under that lease. The amount claimed to be due from defendant in plaintiff's statement of claim is \$1,044.22. In defendant's affidavit of meritorious defense he claimed that the lease had been procured by fraud and false representations, that the rent claimed had been paid, and by an amended statement of set-off claimed \$757.52 for moneys advanced for plaintiff and \$975 for legal services performed for plaintiff.

The cause was submitted to the court for trial without a jury, and after hearing the evidence of the parties the trial Judge found that there was due plaintiff from defendant \$841.70, and judgment for that amount was entered, from which defendant prosecutes this appeal.

There were many items in dispute, and we are not able to say from the evidence found in the record that the trial Judge did not arrive at a correct conclusion on the disputed evidence as to the amount due from defendant to plaintiff. The testimony is sufficient to support the finding. Defendant does not seriously dispute the accuracy of the finding of the trial Judge from the items which he took into account in arriving at his conclusions, but contends that under the state of the pleadings plaintiff could not





challenge defendant's right to set off the sums claimed due for attorney's fees and for money advanced plaintiff, because in its affidavit of merits to the set-off plaintiff did not contend that the amounts claimed could not be set off as against its claim as not arising out of the same transaction; and that the defense that defendant did not advance, upon request of plaintiff, or pay out for its use or benefit, at its request or otherwise, the moneys named and referred to, that he did not perform the services for plaintiff or at its request as claimed, and that plaintiff did not assume or agree to pay to defendant the moneys claimed to have been advanced or for the services claimed to have been rendered did not entitle plaintiff to invoke the rule of law that set-offs to be effective must arise or grow out of the same transactions or contract as involved in plaintiff's cause of action, or that the damages sought to be set off must be liquidated.

The denial that the amount claimed in the set-off was due defendant may be viewed in a dual aspect - one of law and the other of fact. In law, that as the amount of the set-off was not claimed to arise or to grow out of the contract of lease nor the damages sought to be set off liquidated, therefore the amount was not due because it was not in law subject to set-off against plaintiff's claim. In the other view - that of fact - the defense amounted to a denial of the genuineness of the claim or the liability therefor of plaintiff in the event that it should be held that the claim, if valid, could be set off against the claim of plaintiff in suit.

However this may be, under well settled rules of pleading an infirmity in a pleading may be carried back to a preceding pleading, which may be defective or vulnerable



plaintiff's attorney's right to set off the same against the  
 for attorney's fees and for money advanced plaintiff, plaintiff  
 in the affidavit of service to the set-off plaintiff did not  
 contend that the amount claimed would not be set off as  
 against the claim as set forth in the same proceedings;  
 and that the defense that defendant did not advance, was  
 refused as plaintiff, or pay out for its use or benefit, as  
 its request as plaintiff, the money was not returned to,  
 that he did not return the money for plaintiff or as  
 its request as plaintiff, and that plaintiff did not return or  
 return in part to defendant the money claimed to have been  
 advanced or for the services claimed to have been rendered  
 did not make plaintiff to invoke the rule of law that  
 would be to be effective must arise or come out of the same  
 transaction or contract as involved in plaintiff's request  
 of action, or that the money would be set off must be  
 plaintiff.

The second fact the money claimed to the set-off  
 was the defendant may be viewed in a dual aspect - one as  
 law and the other as fact. In law, that we have assumed as  
 the set-off was not claimed to arise or to come out of the  
 contract of loan nor the money would be set off  
 plaintiff, therefore the amount was not the amount of the  
 was in law subject to set-off against plaintiff's claim.  
 In the other view - that of fact - the defense wanted to  
 a finding of the genuineness of the claim or the liability  
 character of plaintiff in the event that it would be held  
 that the claim, if valid, could be set off against the  
 claim of plaintiff in whole.

However this may be, what will result when  
 of plaintiff in setting in a pleading may be limited both  
 in a pleading plaintiff, which may be defective or vulnerable

to attack. Applying this well settled rule to the instant case, we find on referring to the abstract of the record, which is defendant's pleading in this court, the following as his claim of set-off: "Amended statement of claim filed February 26, 1916. The itemized statement shows moneys advanced in the amount of \$757.52 and for legal services performed for said company in a total of \$975." This certainly states naught that can be construed as a claim arising out of the contract of lease in suit or as a claim resting in liquidated damages. This claim of set-off presented no issue triable in this suit, and on motion might have been stricken from the files. The action of the court, which in effect held that the claim of set-off presented no triable issue, eliminated that pleading from the cause.

We therefore conclude that plaintiff was entitled to contest defendant's set-off on the ground that it was not germane to the claim of plaintiff or in any way connected with the contract of lease sued upon, and that the set-off was not for damages which were liquidated. Furthermore, we agree with the holding of the trial Judge that defendant's counter claim was not the subject of set-off in this cause.

We think this case comes within the ruling in Even v. Wilbor, 208 Ill. 492, that unliquidated damages arising out of contracts or covenants disconnected from the subject matter of the plaintiff's claim, are not proper subjects of set-off under the statute. Hawks v. Lands, 3 Gilm. 227; Sargeant v. Kellogg, 5 ibid, 273.

The judgment of the Municipal Court being free from reversible error is affirmed.

AFFIRMED.





THE MIDLAND PRESS, a  
corporation.

Appellant,

vs.

F. E. COMPTON & COMPANY,  
a corporation, et al.,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

204 I.A. 216

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The complainant filed its bill against defendants for injunctive relief, basing its right to such relief in virtue of a written contract between complainant and McBride, Miller and Hughes. To this bill a general and special demurrer were interposed and sustained, whereupon complainant took leave to file an amendment to its bill and, in the amendment filed pursuant to such leave, averred that the contract of the parties in dispute rested "partly in writing and partly orally."

To the bill as thus amended the demurrers on file were extended, and on a hearing such demurrers were sustained to the original bill of complainant and the amendment thereto, and complainant electing to stand by its bill as amended, a decree dismissing it for want of equity was entered, from which this appeal was prayed, and we are now asked to reverse that decree.

By the averments of the bill as amended it appears that the contract between the parties set out in complainant's pleading and in virtue of which the rights, obligations and duties of the parties to the contract must be admeasured, expired by efflux of time on January 1st, 1917. The questions arising are therefore in the main moot ques-





tions as to which equity will not grant any relief.

The main provisions of the contract relate to personal service of the defendants McBride and Miller in and about the exploiting of the sale of certain publications anterior to January 1, 1917, and included in the relief prayed is that defendants F. E. Compton & Company and Frank E. Compton be enjoined from inducing McBride, Miller and Hughes to break their contract with complainant. It is therefore patent that had an injunction been granted by the Chancellor on this branch of the case, it would have expired by limitation; and that as the injunction could in no event have extended beyond such limit of time, and that limit having passed, it would be a work of supererogation to direct the trial court to grant an injunction which, in the circumstances of the case, could not be operative as to the instant or any future time. Mammoser v. City of Chicago, 173 Ill. App. 63.

However, complainant also seeks to enjoin defendants from circulating false and fraudulent reports to the effect that one of complainant's publications is an infringement upon the copyright of a publication of the Grolier Society, and that the Society is about to commence legal proceedings against all parties guilty of such infringement, etc.

Taking these averments as true, they constitute, if anything, a trade slander, impugning the title to and the right of complainant to deal in the publication thus attacked. It is well settled that a court of equity will not enjoin the publication of either a slander or a libel, and certainly no relief can be granted in equity by an injunctive proceeding for torts committed in the past.

Everett Piano Co. v. Bent, 60 Ill. App. 372;

tion as to which party will not be held liable.

The main provisions of the contract relate to

personal service of the defendant's solicitor and his firm in and about the execution of the sale of certain real estate and period to January 1, 1917, and included in the bill passed is that defendant's F. E. Thompson & Company and Frank J.

Thompson be enjoined from inducing defendant's solicitor and his firm to break their contract with defendant. It is therefore stated that an injunction has been granted by the Chancellor on this branch of the case, it would have existed by limitation; and that the injunction should be no event have extended beyond such limit of time, and that it is having passed. It would be a work of investigation to direct the trial court to grant an injunction and in the circumstances of the case, could not be operative as to the instant or any future time. Thompson v. F. E. Thompson & Co.

173 Ill. App. 53.

However, complaint also seeks to enjoin de-

endants from obtaining false and fraudulent reports to the effect that one of defendant's positions is an in-

terference with the payment of a dividend of the

Weller Society, and that the society is about to commence

legal proceedings against all parties guilty of such interference.

and, etc.

Being these various and other facts, the Chancellor,

it appearing, a decree should, accordingly the bill to and

the right of defendant to deal in the position of an in-

terference. It is well settled that a court of equity will

not allow the execution of a writ of assistance to a land.

and accordingly the bill and its contents to equity by an in-

junction proceeding for force granted in the case.

Thompson v. F. E. Thompson & Co., 173 Ill. App. 53.



Chicago City Ry. Co. v. General Electric, 74 ibid 465; Francis v. Flinn, 118 U. S. 385; Willis v. O'Connell, 231 Fed. 1004.

The remedy at law for trade slander is adequate; therefore where equitable relief in such circumstances is sought to be invoked, it will be denied. Moreover, in an action of slander the defendant is entitled to a trial by jury - a constitutional right which cannot be denied, even indirectly, by the interposition of a court of equity.

The bill as amended declares inter alia "that the contract was thereupon entered into between complainant and Miller, McBride and Hughes, partly in writing and partly orally," etc. Where a contract is reduced to writing and no fraud or mistake intervenes or is charged, it becomes the contract of the parties, the provisions of which will control their rights, obligations and remedies; and such a contract cannot be varied, changed, detracted from or added to by contemporaneous oral agreement. A contract partly in writing and partly oral is, by legal interpretation, an oral contract. A contract cannot be said to be in writing unless the parties thereto, as well as its terms and provisions, can be ascertained from the contract itself. Conductors' Benefit Association v. Loomis, 142 Ill. 560; Same v. Tucker, 157 ibid 194.

Treating, then, the contract as oral, the statute of frauds inhibits the granting of relief, as it is averred that the duration of the contract was to be two years and four months, while the limitation of time must not, to escape the statute, extend beyond one year. Sec. 1, chap. 59, R. S.

We think the contract is defective for want of mutuality of either remedy or obligation, and that the restrictive covenant as to territory being without limitation is void as against public policy and as being in restraint of trade.



1. 1947 : 1948 : 1949 : 1950 : 1951 : 1952 : 1953 : 1954 : 1955 : 1956 : 1957 : 1958 : 1959 : 1960 : 1961 : 1962 : 1963 : 1964 : 1965 : 1966 : 1967 : 1968 : 1969 : 1970 : 1971 : 1972 : 1973 : 1974 : 1975 : 1976 : 1977 : 1978 : 1979 : 1980 : 1981 : 1982 : 1983 : 1984 : 1985 : 1986 : 1987 : 1988 : 1989 : 1990 : 1991 : 1992 : 1993 : 1994 : 1995 : 1996 : 1997 : 1998 : 1999 : 2000 : 2001 : 2002 : 2003 : 2004 : 2005 : 2006 : 2007 : 2008 : 2009 : 2010 : 2011 : 2012 : 2013 : 2014 : 2015 : 2016 : 2017 : 2018 : 2019 : 2020 : 2021 : 2022 : 2023 : 2024 : 2025 : 2026 : 2027 : 2028 : 2029 : 2030 : 2031 : 2032 : 2033 : 2034 : 2035 : 2036 : 2037 : 2038 : 2039 : 2040 : 2041 : 2042 : 2043 : 2044 : 2045 : 2046 : 2047 : 2048 : 2049 : 2050 : 2051 : 2052 : 2053 : 2054 : 2055 : 2056 : 2057 : 2058 : 2059 : 2060 : 2061 : 2062 : 2063 : 2064 : 2065 : 2066 : 2067 : 2068 : 2069 : 2070 : 2071 : 2072 : 2073 : 2074 : 2075 : 2076 : 2077 : 2078 : 2079 : 2080 : 2081 : 2082 : 2083 : 2084 : 2085 : 2086 : 2087 : 2088 : 2089 : 2090 : 2091 : 2092 : 2093 : 2094 : 2095 : 2096 : 2097 : 2098 : 2099 : 2100 : 2101 : 2102 : 2103 : 2104 : 2105 : 2106 : 2107 : 2108 : 2109 : 2110 : 2111 : 2112 : 2113 : 2114 : 2115 : 2116 : 2117 : 2118 : 2119 : 2120 : 2121 : 2122 : 2123 : 2124 : 2125 : 2126 : 2127 : 2128 : 2129 : 2130 : 2131 : 2132 : 2133 : 2134 : 2135 : 2136 : 2137 : 2138 : 2139 : 2140 : 2141 : 2142 : 2143 : 2144 : 2145 : 2146 : 2147 : 2148 : 2149 : 2150 : 2151 : 2152 : 2153 : 2154 : 2155 : 2156 : 2157 : 2158 : 2159 : 2160 : 2161 : 2162 : 2163 : 2164 : 2165 : 2166 : 2167 : 2168 : 2169 : 2170 : 2171 : 2172 : 2173 : 2174 : 2175 : 2176 : 2177 : 2178 : 2179 : 2180 : 2181 : 2182 : 2183 : 2184 : 2185 : 2186 : 2187 : 2188 : 2189 : 2190 : 2191 : 2192 : 2193 : 2194 : 2195 : 2196 : 2197 : 2198 : 2199 : 2200 : 2201 : 2202 : 2203 : 2204 : 2205 : 2206 : 2207 : 2208 : 2209 : 2210 : 2211 : 2212 : 2213 : 2214 : 2215 : 2216 : 2217 : 2218 : 2219 : 2220 : 2221 : 2222 : 2223 : 2224 : 2225 : 2226 : 2227 : 2228 : 2229 : 2230 : 2231 : 2232 : 2233 : 2234 : 2235 : 2236 : 2237 : 2238 : 2239 : 2240 : 2241 : 2242 : 2243 : 2244 : 2245 : 2246 : 2247 : 2248 : 2249 : 2250 : 2251 : 2252 : 2253 : 2254 : 2255 : 2256 : 2257 : 2258 : 2259 : 2260 : 2261 : 2262 : 2263 : 2264 : 2265 : 2266 : 2267 : 2268 : 2269 : 2270 : 2271 : 2272 : 2273 : 2274 : 2275 : 2276 : 2277 : 2278 : 2279 : 2280 : 2281 : 2282 : 2283 : 2284 : 2285 : 2286 : 2287 : 2288 : 2289 : 2290 : 2291 : 2292 : 2293 : 2294 : 2295 : 2296 : 2297 : 2298 : 2299 : 2300 : 2301 : 2302 : 2303 : 2304 : 2305 : 2306 : 2307 : 2308 : 2309 : 2310 : 2311 : 2312 : 2313 : 2314 : 2315 : 2316 : 2317 : 2318 :

The results of the study are as follows:

...by the institution of a court of equity.

The bill is expected to be introduced in the House in the near future.

and other, similar and minor, partly in writing and partly orally. The contract is reduced to writing and signed by the parties. The contract is entered into between the parties.

no form or other evidence of its receipt, it should be

that cannot be varied, changed, deleted, or added to  
-and a more complete, detailed and detailed, and more a con-

Writing and editing done by local investigators on field  
by telephone and personal interviews. A contract party in

from the parties involved, as well as the terms and provisions of the contract. A contract cannot be said to be in effect unless

can be sustained from the contract itself. Goldman v. ...

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RECEIVED AT THE OFFICE OF THE SECRETARY OF THE ARMY  
WASHINGTON, D. C. 20315

...the ... of ...

...chap. 50, 7, 2.

2. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the United States in the area of the Commission's jurisdiction.

-019876-1

five covenants, as to territory, with a slight limitation in regard

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Union Strawboard Co. v. Bonfield, 193 Ill. 420; Lansit v. Sefton Mfg. Co., 184 ibid 326.

The bill as amended was clearly obnoxious to the demurrer interposed, complainant not being entitled to the equitable relief prayed or to any portion of such relief.

The decree of the Superior Court sustaining the demurrer of defendants to the bill of complainant as amended is affirmed.

**AFFIRMED.**

John Edwards Co. v. Phillips, 100 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The bill as amended was directly introduced to the Governor, and, notwithstanding the fact that the bill as amended was not being sent to the Senate, the bill as amended was not being sent to the Senate.

The terms of the report were amended as the Governor of the bill as amended as amended is amended.

APPENDIX.

364 - 21761

ANNA HILLER,

Plaintiff in Error,

vs.

ADOLPH HOLMAN, et al.,

Defendants in Error.)

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

204 I.A. 223

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff in error filed a bill against the defendants in error for an accounting and the cancellation of two trust deeds upon certain real estate. The account was stated by the master, his report was approved and a decree entered canceling and removing one of the trust deeds. Complainant asks that the decree be reversed on the ground that both trust deeds should have been ordered delivered up and canceled.

It appears that after the issues were joined the cause was referred to a master in chancery to take proofs and report his conclusions upon the law and the facts. After hearing the evidence, the master made up his report stating the account between the parties, and recommended, inter alia, that the trust deed dated December 31, 1900, given to secure an indebtedness of \$2000, be set aside and declared null and void, and that the prayer of the bill be granted. Objections were filed by the defendants to certain items in the account as stated by the master, but no objection was made to the finding and recommendation that said trust deed be declared null and void. The objections were overruled and ordered to stand as excep-



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tions, and without the chancellor's passing upon them, the cause was re-referred to the master with directions to report his conclusions as to specific items in the account. Thereafter the master filed a supplemental report in accordance with the order. The defendants again filed objections as to certain items and on the hearing of the supplemental report before the chancellor, on motion of the defendants, the matter was again re-referred to the master with directions in reference to the statement of certain items in the account. Thereafter the master heard additional evidence and made up a third report. When this report was filed, defendants filed exceptions thereto in reference to certain items allowed by the master, but afterwards, upon notice to the complainant, moved the court that the master's report be approved and a decree entered, which was accordingly done. To the entry of this decree the complainant objected on the ground that the trust deed above mentioned was not ordered canceled.

Counsel for both parties in this court have argued as to the correctness of the master's report in stating the account, and have discussed the merits of the case. None of this argument is proper, as defendants abandoned their exceptions filed to the master's reports and both parties were satisfied with the findings and recommendations of the master. Therefore, the only question before us is, is the decree in accordance with the recommendations of the master? The decree recites that the cause came on for hearing upon the pleadings and the master's report filed November 8, 1911, and the master's report dated August 20, 1912, these being the first and third reports respectively. In the first report,

Ground that the first dose mentioned was not ordered  
to the body of this report the respondent objected on the  
be answered and a letter received, which was accordingly done.  
to the defendant, even the fact that the writer's points  
were allowed to the writer, not otherwise, when he  
respondent filed appropriate reports in reference to certain  
and made up a false report. When this report was filed,  
summed. Therefore the writer heard additional evidence  
from in reference to the treatment of certain items in the  
the matter was again referred to the writer with this  
report before the respondent, in action of the defendant,  
as to certain items and on the receipt of the respondent  
under the order. The defendant again filed additional  
Therefore the matter filed a respondent, which is correct  
from, and without the respondent's having been told, the  
cause was referred to the writer with this objection to be  
with the respondent as to specific items in the account.

General for each person in the case have been  
as to the necessity of the subject's presence in making the  
subject, and have discussed the matter of the case. Some of  
this appeared in press, an editorial statement which was  
captioned first to the subject's reports and which were  
published after the findings and recommendations of the subject.  
Therefore, the only question before us is, in the absence of  
corroboration with the recommendations of the subject, the  
subject would have the same name as the person upon the  
findings and the subject's report dated November 8, 1931, and  
the subject's report dated August 20, 1931, there being no  
first and last names respectively. In the first report,

the master expressly found that the trust deed in question was not an equitable lien upon the premises and recommended that it be set aside and declared null and void. As the decree fails to conform with the recommendations in this regard, it is erroneous. The decree, therefore, in so far as it fails to set aside the trust deed dated December 31, 1900, securing an indebtedness of \$2000, is reversed and the cause remanded with directions to enter a decree in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.





DANIEL A. LEVY, JOHN F. TYRRELL  
and WILLIAM H. DEVENISH, doing  
business as Levy, Tyrrell &  
Devenish,

Defendants in Error,

vs.

CAROLINE PAYNE,

Plaintiff in Error.)

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 224

MR. PRESIDING JUSTICE O'CONNOR delivered the  
opinion of the court.

Daniel A. Levy, John F. Tyrrell and William H.  
Devenish, doing business as Levy, Tyrrell & Devenish,  
brought suit in attachment against Caroline Payne to re-  
cover \$6,075 for moneys advanced and services rendered as  
attorneys. The case was tried before the court without  
a jury, and judgment was entered in favor of the plaintiffs  
for the amount of their claim, to reverse which this writ  
of error is prosecuted.

In the affidavit for attachment, plaintiffs stated  
that their action was based upon an account stated, the  
nature of which is "for moneys due and owing to said Daniel  
A. Levy, John F. Tyrrell and William H. Devenish doing busi-  
ness as Levy, Tyrrell and Devenish, \* \* \* agreed upon on,  
towit, the eighth day of July, 1914." Certain parties were  
served as garnishees, and Mrs. Payne being a nonresident  
was served by publication. She filed an affidavit of merits  
denying plaintiff's claim in toto. On May 28th, on motion  
of the defendant, due notice thereof having been given to  
plaintiffs, an order was entered giving the defendant leave

LEWIS A. LEVY, JOHN T. SPURRIER  
and WILLIAM E. DEVEREAUX, claimants,  
Defendants as to the first cause of action,  
versus

Defendants as to the second cause of action,

vs.

LEWIS A. LEVY, JOHN T. SPURRIER,  
claimants as to the third cause of action,

2011.1.23

IN SENATE, JANUARY 23, 1911.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE.

LEWIS A. LEVY, JOHN T. SPURRIER and WILLIAM E. DEVEREAUX, claimants, versus the State of New York, as to the first cause of action, for the recovery of the sum of \$10,000 for money advanced and services rendered as attorneys. The case was tried before the Court of Sessions in New York City, and judgment was entered in favor of the claimants for the amount of their claim, to wit: \$10,000, with interest thereon from the date of payment of the claim to the date of judgment. The case was tried before the Court of Sessions in New York City, and judgment was entered in favor of the claimants for the amount of their claim, to wit: \$10,000, with interest thereon from the date of payment of the claim to the date of judgment.

In the second cause of action, the claimants claimed that their money was wrongfully taken from them by the State of New York, and that they were entitled to the recovery of the same. The case was tried before the Court of Sessions in New York City, and judgment was entered in favor of the claimants for the amount of their claim, to wit: \$10,000, with interest thereon from the date of payment of the claim to the date of judgment. The case was tried before the Court of Sessions in New York City, and judgment was entered in favor of the claimants for the amount of their claim, to wit: \$10,000, with interest thereon from the date of payment of the claim to the date of judgment.

to file interrogatories instanter, which the plaintiffs were ruled to answer in one day, and the case was continued to June 28th to allow defendant to take depositions. The interrogatories and answers thereto were filed on the same day. The answers, however, through an error in numbering, were placed in the files of another case, and the error was not discovered until the 24th or 25th of June, when the correction was made and the answers put in the proper files. The case came on for hearing on June 28th, and counsel for the defendant moved for a continuance of at least thirty days to enable them to take the depositions of the defendant and another witness. The court denied the motion, evidence was introduced on behalf of the plaintiffs and judgment was entered in their favor.

In support of defendant's motion for a continuance two affidavits were read, one made by a clerk employed in the office of defendant's counsel, who swears that during the period from May 28th to June 22nd, at intervals of every two or three days, he searched the files in the case for plaintiffs' answers to defendant's interrogatories, that he also searched the records of the Municipal Court; that such answers were not in the files, and that the records did not show they had been filed.

The other affidavit was made by one of defendant's counsel, wherein he stated that on or about May 10th, when the case was called for trial, he stated in open court to one of the plaintiffs that the defendant, Caroline Payne, resided in New York; that she was an actress and was also known as Mrs. Leslie Carter; that she had an engagement in London, England; that to keep such engagement she would be required to leave the following Friday from New York for





London and would not return until the latter part of August; that counsel for defendant then stated if plaintiffs would stipulate before the following Tuesday the depositions of the defendant and her New York counsel would be taken; that if the stipulation was not entered into counsel would ask that the case be continued until defendant's return, or until the depositions of herself and her New York counsel could be taken; that one of plaintiffs in open court then stated that he would advise defendant's counsel before the following Tuesday whether plaintiffs would enter into such a stipulation; that said plaintiffs did not notify counsel for the defendant until Friday, the day preceding the departure of the defendant for London; that on May 28th, when the case again came on for hearing, defendant's counsel stated that the defendant was in London, and moved for a continuance so that her deposition might be taken, and further that leave be given defendant's counsel to file interrogatories and for a rule on plaintiffs to answer the same in one day; that from May 28th to June 22nd he appeared in the clerk's office of the Municipal Court every second day, Sundays excepted, and examined the files and orders in the case to see if plaintiffs' answers to the interrogatories had been filed; that the answers were not in the files and no notation appeared on the record showing they had been filed; that without these answers defendant's counsel could not intelligently take the depositions of defendant and other witnesses; that neither the defendant nor her counsel knew what the plaintiffs' claim was until the answers were found in the files; that upon finding such answers counsel immediately wrote defendant in London, but had received no reply.

[illegible]



The affidavit further stated that the continuance was not for the purpose of delay, but for the sole purpose of enabling the defendant to make a proper defense; that he was informed and believed that the defendant would deny plaintiffs' claim that there was an account stated; that if the cause was continued thirty days he would also take the deposition of defendant's New York counsel, who he is informed will also deny that there was an account stated as set forth in plaintiffs' affidavit.

From the foregoing it clearly appears that the plaintiffs' affidavit for attachment did not sufficiently inform the defendant as to the nature of plaintiffs' claim to enable her to prepare her defense, and that she did not have such information until the answers to her interrogatories were found in the files of the case four or five days before the day set for trial, which was then too late to permit the taking of her deposition and that of her New York counsel. It is evident that the court in continuing the case from May 28th to June 28th was of the opinion that at least thirty days' time would be required to enable counsel for the defendant to take defendant's deposition in London, as she was sailing on that date, and it was through no fault of the defendant or her counsel that the answers to the interrogatories were misplaced, and as these answers were not found until three or four days before the date of the trial, it is clear that the depositions could not be taken at that time. Under these circumstances, the court should have granted the continuance, and not to do so was an abuse of discretion.



The affidavit further stated that the defendant was not for the purpose of delay, but for the sole purpose of enabling the defendant to make a proper defense; that he was informed and believed that the defendant would deny plaintiff's claim that there was an account stated; that if the court was satisfied that there was an account stated the deposition of defendant's New York counsel, who he is informed will also deny that there was an account stated as set forth in plaintiff's affidavit.

From the foregoing it clearly appears that the defendant's affidavit for attachment did not maliciously inform the defendant as to the nature of plaintiff's claim to enable her to prepare her defense, and that she did not have such information until the answers to her interrogatories were filed in the files of the case four or five days before the day set for trial, which was then too late to permit the taking of her deposition and that of her New York counsel. It is evident that the court in examining the case from July 13 to June 28th was of the opinion that at least thirty days' time would be required to enable counsel for the defendant to take defendant's deposition in London, as she was sailing on that date, and it was through no fault of the defendant or her counsel that the answers to the interrogatories were withheld, and on those answers were set forth until some six days before the date of the trial, it is clear that the defendant could not be taken at that time. After these circumstances, the court should have granted the attachment, and not so to use as means of disposing.

As there will have to be a new trial, it is necessary for us to pass on some of the contentions made by the defendant. The defendant contends that under the rules of the Municipal Court, plaintiffs were required to file a statement of claim; that plaintiffs filed no statement of claim, and that no valid judgment can be entered without such statement. This contention is without merit, as there was a statement of claim in plaintiffs' affidavit of attachment, and it was unnecessary to file another.

Defendant also contends that as the trial judge was a county judge of Henderson county, he was not authorized to try the case, as it involved more than \$1,000 which is the limit of the jurisdiction of the County Court. In support of this contention defendant cites the case of Henly, Admr. v. Mobile & Ohio R. R. Co., 161 Ill. App. 138. That case is not in point, as the court there was passing on section 14 of the act in relation to city courts, while in the case at bar section 13 of the Municipal Court act applies, and its terms are much broader than those of said section 14. Furthermore the Supreme Court of this state has held that a county judge is authorized to hold court in the Municipal Court of Chicago. American Badge Co. v. Lena Park Improvement Association, 246 Ill. 589.

The further contention made by the defendant that as plaintiffs' claim had been assigned to one H. B. King, the suit could not be maintained in the name of the plaintiffs. This contention was not brought to the attention of the trial judge, and cannot be urged for the first time in a court of review, but as the case must be reversed

It will have to be a new trial, 1-12  
 necessary for us to have on some of the witnesses made by  
 the defendant. The defendant certifies that these are the  
 of the original Court. Plaintiff's were returned as false  
 a statement of claim; that Plaintiff filed an affidavit  
 of claim, and that in said judgment can be entered against  
 such statement. This contention is without merit, as there  
 was a statement of claim in Plaintiff's affidavit of claim-  
 ment, and it was necessary to file same.

Defendant also contends that on the trial there  
 was a faulty judge of defendant's money, he was not subse-  
 quent to try the case, as it involved more than \$1,000 which  
 is the limit of the jurisdiction of the County Court. In  
 support of this contention defendant cites the case of  
Smith, et al. v. White & White, N. H. Co., 122 Ill. App. 122.  
 This case is not in point, as the court there was holding  
 on section 14 of the act in relation to city courts, while  
 in the case on the section 13 of the original Court was  
 applied, and the same are much broader than those of said  
 section 14. Furthermore the County Court of this State  
 has this last a county judge is authorized to hold court  
 in the original Court of Chicago. Section 13, Ch. 13.  
State Court Jurisdiction, 242 Ill. 301.

The further contention made by the defendant  
 that the Plaintiff's claim had been assigned to one H. G.  
 King, and that same has been retained in the name of the  
 Plaintiff. This contention was not material in the exam-  
 ination of the trial judge, and cannot be relied for the trial  
 time in a court of review, but as the same will be reviewed

and the cause remanded for a new trial, the error, if any, may be cured by showing that the suit is brought for the use of King.

For the error in refusing to grant the continuance, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.



and the same remained for a new trial, the error, it was  
said, was cured by showing that the suit is brought for the  
use of King.

For the error in refusing to grant the writ  
was, the judgment of the Supreme Court of Illinois is  
reversed and the writ granted.

**REVEREND AND HONORABLE**

412 - 21810

ANNA BRADLEY,

Appellee,

APPEAL FROM

vs.

SUPERIOR COURT,

COOK COUNTY.

SIEGFRIED (alias Sigmund) SCHMAYER,  
Appellant,

204 I.A. 231

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This case is a stench in the nostrils of a court of justice. It was brought by the plaintiff, an admitted prostitute, against the defendant, who the evidence shows was equally devoid of morals, to recover damages for a breach of contract of marriage. We will not defile the records of this court by referring to the evidence. The jury returned a verdict in favor of the plaintiff for \$9,750. The court required a remittitur of \$4,750 and entered judgment for \$5,000.

At the request of the plaintiff the court instructed the jury that if they believed from the evidence that there was a contract of marriage entered into between the parties, and the defendant failed to carry out the contract "without good and legal cause therefor;" and that plaintiff was damaged by reason of such failure to carry out his promise, then they should find for the plaintiff. This instruction is clearly erroneous, as it left the jury to determine what was a good and legal cause which would warrant the defendant in refusing to marry the plaintiff. This was a question of law to be decided by the trial judge, and not a question of fact for the jury.

ALL - 1110

ANNA MARSH

W.

ALPHABETICALLY (also alphabetically)  
ALPHABETICALLY

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201 T. A. 201

MR. MARSHING (with O'Connor) delivered the opinion  
of the court.

This case is a review in the matter of a writ  
of habeas corpus. It was brought by the plaintiff, an admitted  
prisoner, against the defendant, who the evidence shows  
was actually devoid of assets, to recover damages for a  
breach of contract of marriage. We will not delve into  
the details of this case by referring to the evidence. The  
jury returned a verdict in favor of the plaintiff for \$5,000.  
The court rendered a judgment of \$5,000 and entered judgment  
for \$5,000.

At the request of the plaintiff the jury requested  
the jury that it was satisfied from the evidence that there  
was a contract of marriage entered into between the parties,  
and the defendant failed to carry out the contract "without  
good and lawful cause therefor;" and that plaintiff was damaged  
by reason of such failure as equity and the justice, then jury  
should find for the plaintiff. This instruction is clearly  
erroneous, as it left the jury to determine what was a good  
and lawful cause which would excuse the defendant in failing  
to carry out the contract. This was a question of law to be  
decided by the trial court, and not a question of fact for the  
jury.

Instruction No. 9 is subject to the same objection.

Complaint is made of the action of the court in refusing instructions No. 3, 4 and 5, offered on behalf of the defendant. These instructions were properly refused.

For the errors in giving the instructions above mentioned, the judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.



Investigation No. 10 is subject to the same objection.

Investigation is made of the action of the court in

returning investigation No. 3, 4 and 5, ordered as herein.  
of the defendant. These investigations were previously returned.

For the errors in giving the investigations above  
mentioned, the judgment of the Superior Court at Cook County  
is reversed and the cases remanded.

**REVEREND AND MODERATE**

534 - 21932A

GEORGE E. DIERSSEN, et al.,  
Appellees.

vs.

NATIONAL BEN FRANKLIN FIRE  
INSURANCE CO.,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 245

MR. PRESIDING JUSTICE O'CONNOR delivered the  
opinion of the court.

This is a suit brought on a fire insurance policy,  
and a judgment was entered in favor of the plaintiffs for  
\$1596.57. By stipulation of the parties, the decision of  
this court in the case of George E. Dierssen, et al. v.  
Williamsburg City Fire Insurance Company, General No. 21931,  
controls the decision in this case. The judgment in that  
case having this day been affirmed, it follows that the  
judgment of the Municipal Court of Chicago in this case  
must also be affirmed.

AFFIRMED.

GEORGE T. HENDERSON, et al.,  
Appellants.

vs.

NATIONAL FIRE INSURANCE CO.,  
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2011A.215

THE PRESIDING JUSTICE OF THE COURT DELIVERED THE

OPINION OF THE COURT.

This is a writ brought on a writ of habeas corpus, and a judgment was entered in favor of the plaintiff for \$1000.00. By stipulation of the parties, the decision of this court in the case of George T. Henderson, et al. v. National Fire Insurance Co., General No. 21031, controls the decision in this case. The judgment in that case having this day been affirmed, it follows that the judgment of the Municipal Court of Chicago in this case must also be affirmed.

AFFIRMED.

GEORGE F. DIERSSEN, et al.,  
Appellees.

vs.

THE ALBANY INSURANCE COMPANY,  
Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 246

MR. PRESIDING JUSTICE O'CONNOR delivered the  
opinion of the court.

This is a suit brought on a fire insurance policy,  
and a judgment was entered in favor of the plaintiffs for  
\$1064.38. By stipulation of the parties, the decision of  
this court in the case of George E. Dierassen, et al. v.  
Williamsburg City Fire Insurance Company, General No.21931,  
controls the decision in this case. The judgment in that  
case having this day been affirmed, it follows that the  
judgment of the Municipal Court of Chicago in this case  
must also be affirmed.

AFFIRMED.



THE ALABAMA INSURANCE COMPANY,  
Appellee,  
vs.  
GEORGE E. BISHOP, et al.,  
Appellants.  
CIVIL ACTION  
CIVIL ACTION  
OF CHICAGO.

2011.4.246

MR. THEODORE JUSTICE O'CONNOR delivered the

opinion of the court.

This is a suit brought on a life insurance policy, and a judgment was entered in favor of the plaintiffs for \$104,30. By stipulation of the parties, the motion of this court in the case of George E. Bishop, et al. v. The Alabama Insurance Company, General No. 21927 controls the result in this case. The judgment in that case having this day been affirmed, it follows that the judgment of the Municipal Court of Chicago in this case must also be affirmed.

AFFIRMED.

6 - 22059

EDWARD THOMPSON,  
a corporation,

Defendant in Error,

vs.

JOHN GIBSON HALE,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 247

MR. PRESIDING JUSTICE O'CONNOR delivered the  
opinion of the court.

The writ of error in this case seeks to review the record of a judgment of the Municipal Court of Chicago. The plaintiff brought suit against the defendant to recover the purchase price of certain books. The case was tried before the court without a jury, and a judgment entered in favor of the plaintiff for the amount of its claim. The defendant moved the court to set aside the judgment, which motion was denied, and filed a "statement of the case" showing the proceedings had on such motion to vacate. This court heretofore, on motion of the plaintiff, struck from the record said statement of the case.

Plaintiff has moved this court to affirm the judgment, and as all of the assignments of error are based on such statement of the case, there is nothing for this court to pass upon, and the motion of the plaintiff will be allowed.

The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

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DEPARTMENT OF JUSTICE

RECEIVED

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RECEIVED

2011.11.24

RECEIVED

RECEIVED

The writ of error in this case seems to involve the record of a judgment of the Judicial Court of Illinois. The plaintiff brought suit against the defendant to recover the purchase price of certain books. The case was tried before the court without a jury, and a judgment entered in favor of the plaintiff for the amount of the debt. The defendant moved the court to set aside the judgment, which motion was denied, and filed a "Certificate of the Court" showing the proceedings had no such motion to reverse. This court therefore, on motion of the plaintiff, entered from the record said statement of the case.

Plaintiff has moved this court to set aside the judgment, and as all of the assignments of error are based on such statement of the case, there is nothing for this court to pass upon, and the motion of the plaintiff will be denied.

The judgment of the Judicial Court is affirmed.

331 - 21727

ABRAHAM SILBAR,

Defendant in Error,

vs.

FRANK W. KNGWALD,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 248

MR. JUSTICE GOODWIN delivered the opinion of  
the court.

The plaintiff in error seeks the reversal of a judgment against him for two months' rent under a lease. The only witnesses were the parties themselves. The testimony of the defendant in error was to the effect that the plaintiff in error, who was his tenant under an unexpired, written lease, asked him to try to rent the premises for him for the rest of the term, and although he attempted to do so, he was unable to find another tenant. The testimony of the plaintiff in error was to the effect that defendant in error had accepted a surrender of the premises.

In these circumstances, it is impossible for us to say that the court's finding in favor of the defendant in error was manifestly contrary to the weight of the evidence. As there is no other question involved, the judgment of the Municipal Court will be affirmed.

AFFIRMED.



201 - 11107

AMERICAN ALIEN

Belonging to error

WIND TO

WINDING WIND

OF WINDING

W.

WINDING WIND

Belonging to error

201 - 11107

NO. 201107000000 delivered the evidence of

NO. 201107000000

The plaintiff in error seeks the reversal of a

judgment against him for the amount paid under a license.

The only witnesses were the parties themselves. The testi-

mony of the defendant in error was to the effect that the

plaintiff in error, who was his personal agent and authorized,

written license, asked him to pay to him the proceeds for

him for the cost of the farm, and although he attempted

to do so, he was unable to find adequate funds. The testi-

mony of the plaintiff in error was to the effect that before

that in error had received a statement of the proceeds.

In these circumstances, it is impossible for me to

say that the court's finding in favor of the defendant in

error was manifestly contrary to the weight of the evidence.

As there is no other question involved, the judgment of the

court should be affirmed.

REVEREND

345 - 21742.

WILLIAM B. PROUTY,  
Defendant in Error.

vs.

JULIAN ARMSTRONG,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 249

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error is sued out to reverse an order entered by the Municipal Court, denying the motion of plaintiff in error to vacate a judgment against him for \$190.00, entered pursuant to a power of attorney contained in a certain lease. The lease itself contained the following stipulation: "Lease is drawn subject to the attached further agreement signed by both parties to this lease. The lease is made subject to the following:" Then follows eleven items containing improvements to be made by the defendant in error, closing with the following words: "All the above work except installing boiler to be completed by May 10th."

In support of his motion to open up the judgment and for leave to plead, the plaintiff in error set out the failure of defendant in error to comply with the agreement referred to, and that he did not complete said work until two months thereafter; that in consequence, the premises were not ready for occupancy until the latter date, and further set out with great particularity items of damage resulting from this alleged failure of the defendant in error to comply with his covenants, amounting in all to \$243.00.

The motion to vacate the judgment and for leave to plead was made with due diligence, and the facts set up in the affidavit, if true, would have constituted a complete defense to the action on the lease. The contention of the defendant in error is, however, that the facts set up, at most, amounted merely to a counter claim, and did not consti-

1999

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

3041408

Source: 1970 Census of the United States, Bureau of Economic Analysis, Department of Commerce, Washington, D.C.

[illegible]



tute a defense, and that in such a case, the judgment will not be opened up, but the judgment debtor will be left to his action. It is true that it has been held that <sup>a</sup> judgment will not be opened up in order that the defendant may maintain a mere cross action which does not grow out of the same subject matter or agreement, but here, the agreement in regard to improvements to be made by the lessor is incorporated in, and is a part of, the lease. Had the plaintiff in error alleged damages on account of the defendant in error's failure to keep these covenants as a matter of recoupment only, it would have been the duty of the court to consider it like any other defense, since such a course tends to promote justice and avoid a multiplicity of suits. We think that by a parity of reasoning, a defendant ought to be permitted to open up a judgment where he presents an affidavit which shows that by reason of the plaintiff's failure to comply with the terms of the instrument sued on, he is entitled not merely to defeat the plaintiff's action, but to recover a judgment against him. The case is clearly distinguishable from cases where defendants have sought leave to open up a judgment and set up a claim growing out of an entirely different subject matter. We are, therefore, of the opinion that the action of the court in refusing to grant defendant's motion to open up the judgment and allow him leave to defend, was erroneous. Plaintiff further contends that this writ of error must be dismissed because "all errors were waived in the cognovit, and ample powers to confess judgment and waive errors were given in the lease." In such a case, a writ of error will not lie to review the judgment itself, but where a timely motion is made to set aside the judgment, the writ lies to review the action of the court in overruling the motion. (Boyles v.





Chytraus, 175 Ill. 370.)

The order denying the motion of defendant to vacate the judgment is reversed and the cause remanded to the Municipal Court for further proceedings in harmony with the views herein expressed.

ORDER REVERSED  
AND CAUSE REMANDED.

[REVEREND, 2ND LIT. 1891.]

The writer having the honor to receive from  
 you the enclosed is pleased to find that you  
 are still engaged in the study of the subject  
 of the history of the Church in the East.

Very respectfully,  
 Your obedient servant,  
 J. H. [Name]

355 - 21752.

BENJAMIN BROOK,  
(James P. Pio, Defendant in Error,)

ERROR TO

vs.

MUNICIPAL COURT

GEORGE F. SMERLING and  
FRED SMERLING,  
Plaintiffs in Error.

OF CHICAGO.

204 I.A. 250

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiffs in error seek to set aside a judgment for an attorney's lien entered upon the petition of the defendant in error. For the sake of brevity, the defendant in error will be referred to as the petitioner, plaintiffs in error as defendants, and the original plaintiff in the case, as plaintiff.

The record discloses that plaintiff brought suit against the defendants to recover for personal injuries alleged to have resulted from the defendants' negligence. Petitioner, who was the attorney for the plaintiff, filed his petition for an attorney's lien, April 21, 1915, alleging that notice of his attorney's lien had been personally served upon defendants, and a settlement of the suit had been made with plaintiff without the knowledge or consent of the petitioner. A judgment for \$300 was entered on this petition June 4, 1915, and a motion to vacate this judgment was made July 1, 1915. From the statement of facts it appears that in support of this motion, attorney for defendants presented an affidavit which set out that he had been served with a copy of a notice that petitioner would appear in court Monday, May 30, 1915, and ask to have his petition set down for a hearing; that petitioner called the affiant on the telephone, and told him that as Monday was Decoration Day, he would present his motion on Tuesday; that affiant told the petitioner that he would be unable to appear Tuesday, and that thereupon petitioner told him he





would let him know the day and hour of the hearing, and that affiant suggested Thursday of the week following. Affidavits of defendants were also presented, tending to show that one only had been served with notice of the lien, that the injury to the plaintiff was not their fault, and that they had settled the matter for \$35.00. The petitioner's affidavit stated that he had served notice on attorney for the defendants that he would appear on Monday, May 31, and ask to have the petition set for a day certain, but afterwards he learned that all causes set for Monday had been continued for Tuesday, and thereupon he called up the said attorney and told him that he would appear Tuesday instead; that he never agreed to notify him in regard to the date of the hearing; that he did appear on Tuesday; that the case was set for Friday, June 4, at two o'clock, and that it was heard at that time. Upon the reading of these affidavits the court announced that the judgment would be set aside on the payment of \$50.00 attorney's fees, to which the petitioner objected. The court then said that the defendants were entitled to have their day in court, and the attorney for the defendants said, "It is satisfactory to me. Will the court give a week to pay it?" to which the court said, "yes." Thereafter, at the request of defendants' attorney, the time for paying the \$50.00 was extended one week, and afterwards it was again extended by stipulation. After the expiration of this extension, and on account of the failure of the defendants to pay the \$50.00 attorney's fees, the court vacated the order setting aside the judgment, and its action in so doing is assigned as error.

In the absence of any bill of exceptions, we must, of course, assume that sufficient evidence was introduced at the hearing June 4, to sustain the court's findings in favor of petitioner. The only questions before the court, therefore,

would not have been the last and best of the business, and that  
 almost constant reference to the fact of the business, and that  
 of distance were also mentioned, leading to the fact that  
 only had been served with notice at the time, that the notice  
 to the plaintiff was not their fault, and that they had not  
 filed the notice for \$10.00. The plaintiff's attorney  
 stated that he had served notice on the defendant  
 that he would appear on Tuesday, May 11, and that he had  
 petitioned for a day certain, but afterwards he learned that  
 all orders for the hearing had been continued for Tuesday, and  
 therefore he called up the wife attorney and told him that he  
 would appear Tuesday morning; that he never failed to notify  
 him in regard to the time of the hearing; that on his return  
 on Tuesday, that the same was not the Friday, June 1, at the  
 court, and that it was heard at that time. Upon the receipt  
 of these affidavits the court pronounced that the judgment  
 would be set aside on the ground of fraud against the law.  
 to which the plaintiff objected. The court then said that  
 the defendant were entitled to have their case heard, and  
 the attorney for the defendant said, "it is unnecessary to  
 go. All the court have a vote to set it, to which the court  
 said, "yes." Thereafter, at the request of the plaintiff's attorney,  
 say, the day for trying the case was changed to Tuesday.  
 and afterwards it was again continued to Wednesday. After  
 the expiration of this vacation, and on account of the fact  
 that the defendant to pay the \$10.00 attorney's fees, the  
 court vacated the order setting aside the judgment, and the  
 action to go on as before.  
 At the hearing of May 11th of last session, a writ  
 of habeas corpus was granted, and the defendant was released.  
 The court then is in session for the purpose of trying  
 the case. The only question before the court is whether



are as to whether the Municipal Court was warranted in imposing terms in its order vacating the judgment in favor of the petitioner, and whether, upon the failure of defendants to comply with the condition by paying \$50.00 attorney's fees, the court was justified in setting aside the order vacating the judgment.

The statement of facts discloses that attorney for the defendants had actual and timely notice of the fact that petitioner would apply to the court on Tuesday, June 1, and ask to have the petition set for hearing. In view of the fact that defendants' attorney had before him a written notice of the time and place and purpose of the application, and was fully advised of the change in the time, and made no objection to it, we are of the opinion that he must be considered as having been duly notified. The question of whether petitioner told him that he would inform him in regard to the time when the cause was to be heard, is in dispute, but we do not think it controlling, since defendants' attorney had actual notice of the application, and could easily have informed himself as to what order the court had entered. We are therefore of the opinion that it was well within the discretion of the presiding judge to impose terms upon the vacation of the judgment in favor of petitioner; but if it had not been, defendants are in no position to object, in view of the fact that their counsel in open court stated that the order in which the terms were imposed, was satisfactory to him. Drinkwater v. Davidson, 90 Ill. App. 9, cited by counsel for defendants, is not in point, since in that case, on the showing made, it was clearly the duty of the court to vacate the order complained of without conditions, and objection to the imposition of conditions was expressly made. The right of the court, in a proper case, to require the payment of attorney's fees as a condition to



the court was justified in finding that the order violating the statute with the condition of paying \$50.00 although a fine, the punishment, and that, since the failure to perform the order was in the order violating the judgment in favor of the defendant the judgment was reversed in full.

[illegible]

the vacation of an order or judgment is not, in our opinion, subject to question. It was clearly within the scope of defendants' attorney's authority to consent to the terms imposed as a condition in the order setting aside the judgment. It is contended on behalf of defendants, however, that the court erred in including plaintiff's costs in the judgment in favor of petitioner. Obviously, petitioner, who was seeking the enforcement of his own lien, had no right to have plaintiff's costs included in his judgment.

The judgment of the Municipal Court in favor of petitioner for \$300.00 is, therefore, affirmed, but the item of plaintiff's costs in the trial court, which was included in the judgment, is disallowed.

JUDGMENT AFFIRMED EXCEPT  
AS TO PLAINTIFF'S COSTS.

the question of an order of judgment is not, in my opinion, subject to dispute. It was clearly within the scope of defendant's attorney's knowledge to conduct the trial in accordance with the rules of procedure and the law. It is submitted on behalf of defendant, however, that the court acted in violating plaintiff's right in the judgment in favor of plaintiff. Obviously, plaintiff, who was suing for the enforcement of his will, was not to have plaintiff's cause included in his judgment.

The judgment of the trial court in favor of plaintiff for \$100,000 is, however, affirmed, and the item of plaintiff's cause in the trial court, which was included in the judgment, is dismissed.

THOMAS J. BROWN, JUDGE  
IN THE COURT OF APPEALS

392 - 21790.

MICHAEL D. HARNETT,

Defendant in Error,

vs.

CITY OF CHICAGO,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 252

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error, which is hereinafter referred to as the City, seeks the reversal of a judgment against it for \$937.50 in favor of the defendant in error, hereinafter referred to as plaintiff. It appears from the evidence that plaintiff served as police patrolman in the City of Chicago for a number of years prior to March 18, 1907, when he was certified by the Civil Service Commission as eligible for the position of sergeant of police, and that thereupon the superintendent of police appointed him to be sergeant of police, and he acted as such up to February 17, 1908, when he was demoted to the position of police patrolman, and continued to act as such until August 9, 1911, when he was promoted to be a detective sergeant, and that since that time he has acted for two years as patrol sergeant, and one year as desk sergeant. The judgment was rendered for the difference between the salary of patrolman and that of sergeant during the interim in which he was acting as patrolman.

It is a sufficient answer to plaintiff's claim of a right of recovery to say that the evidence fails to show that there was, on April 20, 1907, in the City of Chicago, any office of police sergeant, for it is well established in this State that where a party seeks to recover the salary of an office, he must show the legal existence of the office and his right to hold it. It has been repeatedly held that the ordinance of April 18, 1881, upon which plaintiff relies, and which created the police department and certain positions, did not create the position of detective sergeant, patrol





sergeant, desk sergeant, or sergeant, since the words, "such number of lieutenants, detective sergeants, patrol sergeants, desk sergeants, patrolmen, and other employes as may be provided by ordinance," do not create these positions, but leave them to be thereafter created by ordinance. In this connection, the Supreme Court said, in Bullis v. City of Chicago, 235 Ill. 472, at page 478;

"Section 1477 of the revised code, in providing that the police department should embrace as many patrolmen 'as has been or may be prescribed by ordinance,' cannot be regarded as creating any office of patrolman. (Moon v. Mayor, supra.) The word 'prescribed,' as there used, is equivalent to 'established.' On this record, whatever may be the fact, this evidence offered by appellant to prove that he was a police patrolman was not competent for that purpose."

In Moon v. The Mayor, 214 Ill. 40, the court said, at page 44:

"'As many policemen as the city council may from time to time provide for,' cannot be construed to create any one or more offices of policemen of the city. Its true meaning is, that the police department of the city shall comprise such policemen as shall be legally invested with that office. The section does not, itself, purport to create the office of policeman, and it has no such legal effect."

Plaintiff further contends that the act of 1863, itself, created the office of sergeant of police. The Supreme Court, however, held, in the case of Bullis v. City of Chicago, supra, at page 475, that the organization of the city under the general law "determined the tenure of all officers under the special charter not within the saving clause of the act, which provided that the city officers in office at the time of organization under the general law, 'shall, thereupon, exercise the powers conferred upon like officers in this act until their successors shall be elected and qualified.' \* \* \*

The officers in office at the time of the adoption of the act who should exercise the powers conferred upon like officers by the act until their successors were elected and qualified, were only those officers holding under the special charter

personnel, both permanent and temporary, should be trained, "and  
 number of instructions, directives, memoranda, orders, etc.,  
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"The Director should be authorized to make the necessary changes  
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 from the Director's office, in order to keep the instructions  
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that answer to the same officers provided for in the general law."

Plaintiff, however, contends that the City, in its affidavit of merits, did not deny that the ordinance of April 18, 1881, and the act of 1863, created the office of sergeant of police. This claim is contradicted by the statement in the affidavit of merits, "that prior to March 12, 1911, there was no such office or position or place of employment as sergeant of police of the City of Chicago." Counsel further contends that The People v. McCann, 247 Ill. 130, overrules Bullis v. City of Chicago, *supra*, in that it holds that the ordinance of April 18, 1881, did create the office of inspector of police, but an examination of the ordinance shows that it expressly provided for "one inspector of police for each police division." To hold that such a phrase created the office of inspector, would not be in conflict with a decision that the phrase, "and such number of lieutenants, detective sergeants, \* \* \* as may be provided by ordinance," does not. Counsel further contends that clauses 66 and 68 of section 1 of article 5 of the Cities and Villages Act, create the office of sergeant of police. These clauses are as follows: "Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances. Sixty-eighth. To prescribe the duties and powers of a superintendent of police, policemen and watchmen." Obviously, these clauses created no office whatsoever. Section 1909 of an ordinance of April 1, 1911, which, it is claimed, created the office of sergeant of police, is not controlling, since it did not go into effect until more than three years after plaintiff claims to have been wrongfully demoted.



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General Jones.

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In view of the fact that plaintiff has failed to show the legal existence of the office of police sergeant, or that during the time covered by this suit he performed the duties of such office, we are of the opinion that, under the doctrine laid down in the Bullis case, he is not entitled to recover. The judgment of the Municipal Court is, therefore, reversed.

REVERSED.

In view of the fact that the plaintiff has failed to  
show any legal relationship with the defendant, and  
that the defendant has failed to show any legal  
relationship with the plaintiff, the court is of the  
opinion that the plaintiff has failed to establish  
its case. The judgment of the court is hereby  
affirmed.

WITNESSES

The court is of the opinion that the plaintiff has failed to establish its case. The judgment of the court is hereby affirmed.

372 - 21769.

204 I.A. 254

STEPHEN J. BARRY,

Defendant in Error,

vs.

CITY OF CHICAGO,

Plaintiff in Error. )

} ERROR TO

} MUNICIPAL COURT

} OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The facts in the above entitled case are in all essential features similar to those set forth in Barnett v. City of Chicago, No. 21790, ante, p. \_\_\_\_\_, and for the same reasons as are there stated, the judgment in this case must also be reversed.

REVERSED.



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1900 - 1901

1901 - 1902

1902 - 1903

1903 - 1904

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1906 - 1907

1907 - 1908

1908 - 1909

1909 - 1910

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1911 - 1912

373 - 21770.

PATRICK WOODS,  
Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT

CITY OF CHICAGO  
Plaintiff in Error.

OF CHICAGO.

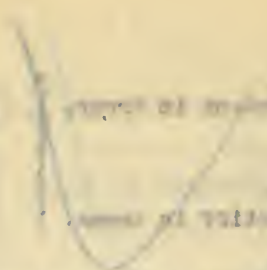
MR. JUSTICE GOODWIN delivered the opinion of the court.

The facts in the above entitled case are in all essential features similar to those set forth in Harnett v. City of Chicago, No. 21790, ante, p. \_\_\_\_\_. and for the same reasons as are there stated, the judgment in this case must also be reversed.

204 I.A. 255

REVERSED.

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2041A.252

THESE TWO

EFFIE C. KUEBLER,  
Appellee,

vs.

GEORGE J. KUEBLER,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY,

204 I.A. 256

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks the reversal of so much of a divorce decree entered against him as relates to solicitor's fees and alimony. It appears that appellee filed her original bill against appellant, in which she sought a divorce from appellant on the ground of extreme and repeated cruelty, and further asked that a certain piece of property standing in the name of the appellant be decreed to be hers in equity and good conscience, and that appellant convey this real estate to her, and that the court grant her alimony and solicitor's fees. An amended bill of complaint setting forth the same matters was afterwards filed. The answer of appellant denied the charges in the bill and her title to the property. Appellant filed a cross bill charging desertion, which appellee denied. The cause was referred to a master, who found that appellee's interest in the real estate in question amounted to \$481.40, which had been subsequently paid her; that the title to the property was in appellant, subject to a trust deed of \$3,000.00, and the dower rights of appellee; that the household furniture belongs to appellant, except the piano and certain other articles, and recommended that, so far as the property was concerned, the bill be dismissed. October 31, the cause was heard on the bill and cross bill, and the jury found appellant guilty of extreme and repeated cruelty, and appellee not guilty of desertion. Afterwards, the matter came before the court June 5, 1913, for the purpose of fixing the terms of the decree, the adjustment of the property rights, and the matter of alimony





and solicitor's fees. After considerable discussion, in which a number of suggestions were made, and after some evidence had been introduced in regard to appellant's financial ability, counsel for appellee said, "Here is another suggestion that I will make along a different line. \* \* \* Let me ask Mr. Kuebler if he will take the property free of any claims on the part of the complainant, and pay her \$100 a month, and she move out?" The Court: "Will you do that?" Mr. McKinley (Counsel for appellant): "We will take the property and pay \$80 a month." The Court: "Well, supposing you give her \$100 a month, Mr. Kuebler, and take the property." Mr. Kuebler: "All right, I will do that." The Court: "All right." The matter of solicitor's fees was then suggested. Mr. Spencer (Counsel for appellee): "I think there ought to be an allowance of \$400." The Court: "I think that will be all right, if you will give him time to pay it." Mr. Kuebler: "How much?" Mr. Spencer: "\$400." The Court: "And not compel him to pay it immediately." Mr. Kuebler: "I couldn't do it." Mr. Spencer: "I wouldn't expect it to be paid immediately." Mr. Kuebler: "Isn't that a little bit high, twenty days - \$40 a day?" Mr. Spencer: "No, \$20 a day, just one half of what it should be." Mr. Kuebler: "What is the forty days for?" Mr. Spencer: "Twenty days. I spent more time than that since I came into the case." Mr. Kuebler: "Well, I am willing to pay \$400, if I can pay it in installments during the next twelve months." Later, Mr. Kuebler said, "I will let her take all of the furniture except my personal library, those books and some furniture that is in my room there now, I will let her take all the balance." The court then directed a decree to be prepared in accordance with this agreement, and, evidently relying upon it, appellee moved out of the property in controversy, thereby surrendering the homestead, and apparently preserved no exceptions to the master's

and nothing to do. The first thing I did was to go to the bank and get some money. I then went to the post office and sent a letter to my mother. I then went to the store and bought some food. I then went to the school and saw the teacher. I then went to the church and saw the minister. I then went to the hospital and saw the doctor. I then went to the court and saw the judge. I then went to the prison and saw the warden. I then went to the factory and saw the manager. I then went to the office and saw the boss. I then went to the house and saw the family. I then went to the street and saw the people. I then went to the field and saw the crops. I then went to the sea and saw the ships. I then went to the sky and saw the stars. I then went to the earth and saw the mountains. I then went to the sun and saw the rays. I then went to the moon and saw the craters. I then went to the planets and saw the rings. I then went to the galaxies and saw the clusters. I then went to the universe and saw the everything.



report which found in favor of appellant's title. Afterwards, on July 27, 1915, the decree was presented in court, and appellant, for the first time, presented objections to the provisions in regard to alimony and solicitor's fees, which he had already expressly agreed to, on the ground that both were excessive, unreasonable, and beyond the financial ability of the appellant. While this was presented before the decree was entered, it was presented in the form of a motion made after entry of the decree, and after motion for an appeal had been allowed. He also asked to have taken into account the fact that appellee had removed the household furniture, although he had expressly authorized it, and objected to the payment of the master's fee, although this had been taken into consideration at the time the agreement was made. He presented certain statements in regard to his assets, liabilities, income, and expenses, together with certain answers to a rule to show cause entered in connection with the allowance of temporary alimony and solicitor's fees.

While it is always within the power of the court to modify a decree for alimony on account of the changed circumstances of the parties, there is nothing in this record which shows that their circumstances had in any way changed between the time when the court fixed the terms of the decree in accordance with appellant's agreement, and the time when his motion for a modification of the decree was made, except that he had, in the mean time, received the benefit of a surrender of the premises which appellee had been occupying up to that time as a homestead. A court of chancery cannot permit a party to enter into an agreement in regard to the terms of a decree, and after receiving the benefit to be derived from it, repudiate it. Had the terms in regard to the alimony been fixed on evidence alone, it still would have required a very strong showing on the part





of the appellant to justify a change in the terms based upon facts in existence at the time of the hearing. But the present case is much stronger, for appellant has, by his express agreement, forever estopped himself from asserting that the terms to which he agreed were not at that time just and reasonable. The facts in regard to his own circumstances were peculiarly within his own personal knowledge, and the sources of information from which he claims to have compiled the statements were as entirely within his control at the time he made the agreement, as they were at the time the decree was entered.

We are therefore of the opinion that the court did not err in entering a decree in accordance with the agreement of appellant entered into in open court, June 5, 1915. The decree of the Circuit Court is affirmed.

AFFIRMED.



261 - 22695.

EFFIE C. KUEBLER,  
Appellee,  
vs.  
GEORGE J. KUEBLER,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

204 I.A. 258

MR. JUSTICE GOODWIN delivered the opinion of the court.

This is an appeal from an order of the Circuit Court that the appellant pay appellee the sum of \$100.00 a month for her support, pending the appeal taken from the original decree, and certain sums on account of the amount for which he was in arrears under the original decree, and the further sum of \$200.00 to enable her to employ counsel. The contention of appellant is that the allowance is not justified by the circumstances of the parties. He relies, first, upon the evidence introduced by appellant at the time the original decree was entered, which was reviewed in Kuebler v. same, Opinion No. 21883. It will be noted that that evidence included appellant's affidavit in regard to his expenses, and disbursements covering a period of seventy-nine months prior to the entry of the original decree. At the time it was offered, there was no cross-examination of appellant in regard to the accuracy and completeness of the statement, and no countervailing proof, for the reason that none was required, since the decree was entered in accordance with an agreement upon the part of the appellant, made at a time when his sources of information in regard to his ability to pay were quite as good as when the decree was entered. It will be recalled also that one consideration for appellant's agreement in regard to alimony and solicitor's fees was the surrender of certain property which appellee was occupying as a homestead, and the relinquishment of all of appellee's claim of title to the property itself. Appellant admits that while the encumbrance upon this place amounted to \$3,000, he



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Source: U.S. Census Bureau, 1990, 1992, 1994, 1996, 1998, 2000, 2002, 2004, 2006, 2008, 2010, 2012, 2014, 2016, 2018, 2020, 2022, 2024, 2026, 2028, 2030, 2032, 2034, 2036, 2038, 2040, 2042, 2044, 2046, 2048, 2050, 2052, 2054, 2056, 2058, 2060, 2062, 2064, 2066, 2068, 2070, 2072, 2074, 2076, 2078, 2080, 2082, 2084, 2086, 2088, 2090, 2092, 2094, 2096, 2098, 2100, 2102, 2104, 2106, 2108, 2110, 2112, 2114, 2116, 2118, 2120, 2122, 2124, 2126, 2128, 2130, 2132, 2134, 2136, 2138, 2140, 2142, 2144, 2146, 2148, 2150, 2152, 2154, 2156, 2158, 2160, 2162, 2164, 2166, 2168, 2170, 2172, 2174, 2176, 2178, 2180, 2182, 2184, 2186, 2188, 2190, 2192, 2194, 2196, 2198, 2200, 2202, 2204, 2206, 2208, 2210, 2212, 2214, 2216, 2218, 2220, 2222, 2224, 2226, 2228, 2230, 2232, 2234, 2236, 2238, 2240, 2242, 2244, 2246, 2248, 2250, 2252, 2254, 2256, 2258, 2260, 2262, 2264, 2266, 2268, 2270, 2272, 2274, 2276, 2278, 2280, 2282, 2284, 2286, 2288, 2290, 2292, 2294, 2296, 2298, 2300, 2302, 2304, 2306, 2308, 2310, 2312, 2314, 2316, 2318, 2320, 2322, 2324, 2326, 2328, 2330, 2332, 2334, 2336, 2338, 2340, 2342, 2344, 2346, 2348, 2350, 2352, 2354, 2356, 2358, 2360, 2362, 2364, 2366, 2368, 2370, 2372, 2374, 2376, 2378, 2380, 2382, 2384, 2386, 2388, 2390, 2392, 2394, 2396, 2398, 2400, 2402, 2404, 2406, 2408, 2410, 2412, 2414, 2416, 2418, 2420, 2422, 2424, 2426, 2428, 2430, 2432, 2434, 2436, 2438, 2440, 2442, 2444, 2446, 2448, 2450, 2452, 2454, 2456, 2458, 2460, 2462, 2464, 2466, 2468, 2470, 2472, 2474, 2476, 2478, 2480, 2482, 2484, 2486, 2488, 2490, 2492, 2494, 2496, 2498, 2500, 2502, 2504, 2506, 2508, 2510, 2512, 2514, 2516, 2518, 2520, 2522, 2524, 2526, 2528, 2530, 2532, 2534, 2536, 2538, 2540, 2542, 2544, 2546, 2548, 2550, 2552, 2554, 2556, 2558, 2560, 2562, 2564, 2566, 2568, 2570, 2572, 2574, 2576, 2578, 2580, 2582, 2584, 2586, 2588, 2590, 2592, 2594, 2596, 2598, 2600, 2602, 2604, 2606, 2608, 2610, 2612, 2614, 2616, 2618, 2620, 2622, 2624, 2626, 2628, 2630, 2632, 2634, 2636, 2638, 2640, 2642, 2644, 2646, 2648, 2650, 2652, 2654, 2656, 2658, 2660, 2662, 2664, 2666, 2668, 2670, 2672, 2674, 2676, 2678, 2680, 2682, 2684, 2686, 2688, 2690, 2692, 2694, 2696, 2698, 2700, 2702, 2704, 2706, 2708, 2710, 2712, 2714, 2716, 2718, 2720, 2722, 2724, 2726, 2728, 2730, 2732, 2734, 2736, 2738, 2740, 2742, 2744, 2746, 2748, 2750, 2752, 2754, 2756, 2758, 2760, 2762, 2764, 2766, 2768, 2770, 2772, 2774, 2776, 2778, 2780, 2782, 2784, 2786, 2788, 2790, 2792, 2794, 2796, 2798, 2800, 2802, 2804, 2806, 2808, 2810, 2812, 2814, 2816, 2818, 2820, 2822, 2824, 2826, 2828, 2830, 2832, 2834, 2836, 2838, 2840, 2842, 2844, 2846, 2848, 2850, 2852, 2854, 2856, 2858, 2860, 2862, 2864, 2866, 2868, 2870, 2872, 2874, 2876, 2878, 2880, 2882, 2884, 2886, 2888, 2890, 2892, 2894, 2896, 2898, 2900, 2902, 2904, 2906, 2908, 2910, 2912, 2914, 2916, 2918, 2920, 2922, 2924, 2926, 2928, 2930, 2932, 2934, 2936, 2938, 2940, 2942, 2944, 2946, 2948, 2950, 2952, 2954, 2956, 2958, 2960, 2962, 2964, 2966, 2968, 2970, 2972, 2974, 2976, 2978, 2980, 2982, 2984, 2986, 2988, 2990, 2992, 2994, 2996, 2998, 3000, 3002, 3004, 3006, 3008, 3010, 3012, 3014, 3016, 3018, 3020, 3022, 3024, 3026, 3028, 3030, 3032, 3034, 3036, 3038, 3040, 3042, 3044, 3046, 3048, 3050, 3052, 3054, 3056, 3058, 3060, 3062, 3064, 3066, 3068, 3070, 3072, 3074, 3076, 3078, 3080, 3082, 3084, 3086, 3088, 3090, 3092, 3094, 3096, 3098, 3100, 3102, 3104, 3106, 3108, 3110, 3112, 3114, 3116, 3118, 3120, 3122, 3124, 3126, 3128, 3130, 3132, 3134, 3136, 3138, 3140, 3142, 3144, 3146, 3148, 3150, 3152, 3154, 3156, 3158, 3160, 3162, 3164, 3166, 3168, 3170, 3172, 3174, 3176, 3178, 3180, 3182, 3184, 3186, 3188, 3190, 3192, 3194, 3196, 3198, 3200, 3202, 3204, 3206, 3208, 3210, 3212, 3214, 3216, 3218, 3220, 3222, 3224, 3226, 3228, 3230, 3232, 3234, 3236, 3238, 3240, 3242, 3244, 3246, 3248, 3250, 3252, 3254, 3256, 3258, 3260, 3262, 3264, 3266, 3268, 3270, 3272, 3274, 3276, 3278, 3280, 3282, 3284, 3286, 3288, 3290, 3292, 3294, 3296, 3298, 3300, 3302, 3304, 3306, 3308, 3310, 3312, 3314, 3316, 3318, 3320, 3322, 3324, 3326, 3328, 3330, 3332, 3334, 3336, 3338, 3340, 3342, 3344, 3346, 3348, 3350,

bio. 1992). Unlike all other members of the *Scorpaenidae*, *Scorpaenopsis*

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Yoon, K. J. and Kim, H. P. 1997. A study on the effects of the size of the group on the group decision-making process. *Journal of Management Education* 21: 103-116.

Author's address: Department of Mathematics, University of California, San Diego, La Jolla, CA 92037, U.S.A.

no. 24, vol. 11, *Transactions of the American Society of Civil Engineers*, 1950, pp. 1099-1107.

of 100 from the 100th Cavalry, Cavalry and mounted Infantry, add

Information on this subject is available at <http://www.fishbase.org>.

*Journal of Management Education* 33(10) 1107-1121

had formerly held it at a valuation of \$6,500, although he was unable to obtain that, or the sum of \$6,000 for it.

It appeared in the proceeding before the master in this case, that after the entry of the decree, the appellant was sued by his brother for what was claimed to be the joint debt of himself and appellee. Appellant permitted himself to be defaulted, and actively assisted his brother in the trial of the case against appellee, in which the jury found in her favor. Appellant, however, turned the real estate in question over to his brother in satisfaction of the judgment thus obtained against him by default, and the master, very properly, we think, found that appellant had unnecessarily disposed of his interest in the property.

In view of this circumstance, and the other evidence disclosed in the record, we are of the opinion that the court's orders in regard to alimony and solicitor's fees cannot be said to be unsupported by the evidence in regard to the circumstances of the parties. The order of the Circuit Court is affirmed.

AFFIRMED.

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CONFIDENTIAL - SECURITY INFORMATION

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1. The first group of people who are not allowed to enter the country are those who are not citizens of the United States.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Source: The *Administrative* of the *United States*. The *United States* of America.

THE UNIVERSITY OF CHICAGO

EFFIE C. KUEBLER,  
Appellee, )

APPEAL FROM

vs. )

CIRCUIT COURT,

GEORGE J. KUEBLER,  
Appellant. )

COOK COUNTY.

204 I.A. 259

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant appeals from an order entered September 22, 1916, committing him for contempt for failing to comply with the order for an allowance for suit money and solicitor's fees, entered April 12, 1916. The appeal last mentioned was decided in Kuebler v. Kuebler, Opinion No. 22695. In passing upon the action of the chancellor in committing appellant for contempt, it must be remembered that the chancellor had before him the facts recited in the opinions filed in Kuebler v. Kuebler, No. 21883, and Kuebler v. Kuebler, No. 22695. In view of those facts we are of the opinion that the court was justified in finding against the appellant upon the question of his ability to comply with the terms of the order of April 12, 1916, notwithstanding his affidavit in which he states, among other things, "that his income has been insufficient to meet his necessary office expenses, maintain his practice and live respectably, and comply with said order."

From the records before us it appears that appellant, after having once agreed upon the amount of solicitor's fees and alimony, and receiving the benefit of the decree, has done all in his power to prevent appellee from receiving the sums to which the court had decreed that she was entitled, and we also feel that the court is justified in considering that the action of appellant in transferring the real estate in question to his brother, and assisting the latter in his suit against appellee, was taken for that purpose. It will be noted, also, that in his attempts to render the decree of the Circuit



2041A.253

THE UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C.

February 1, 1954

Mr. J. Edgar Hoover, Director, Federal Bureau of Investigation, United States Department of Justice, Washington, D. C.

Dear Mr. Hoover:

I have the honor to acknowledge the receipt of your letter of January 28, 1954, regarding the matter of the alleged activities of the Central Intelligence Agency (CIA) in connection with the activities of the Communist Party, U. S. A. (CP, U. S. A.).

The information furnished to me by the CIA regarding the activities of the CP, U. S. A., is being reviewed by the Department of Justice, and the results of this review will be reported to you as soon as they are available.

I am, Sir, very respectfully,  
Very truly yours,  
J. Edgar Hoover, Director

Court ineffectual, he has presented records to this court in three cases, which aggregate over one thousand pages. The pertinency of this fact is suggested by the ruling of our Supreme Court in Barclay v. Barclay, 184 Ill. 471, where the court, in sustaining the order committing the appellant for contempt, and in holding that the defendant had not sufficiently established his inability to perform the decree, commented upon the fact that he had chosen "to spend large sums of money in resisting payments rather than to apply the same in the discharge of his liability."

We are of the opinion that, in view of all the facts disclosed by the record, the court did not err in finding the appellant guilty of contempt. The order of the Circuit Court is, therefore, affirmed.

ORDER AFFIRMED.



361 - 21758

HATTIE PROCTOR,

Appellee,

vs.

W. F. RHORBECK,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

204 I.A. 271

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit for damages brought by Hattie Proctor, appellee, for unlawful eviction and loss of goods and chattels, against W. F. Rhorbeck, appellant.

The first count of the declaration alleges that appellant on September 15th, 1911, entered the flat of appellee and with force and arms took away her goods and chattels to the value of \$2,000. The second count alleges that appellant expelled appellee and her family from said flat and kept them expelled.

Appellant filed a plea of not guilty, and a special plea, that appellee several days prior to the time mentioned in the declaration had informed appellant that she had rented another flat, and that she had moved her chattels.

The jury brought in a verdict for the sum of \$500. The court remitted \$150 and entered a judgment for \$350.



WILLIE PROCTOR,

Appellee,

vs.

W. F. ARCHERSON,

Appellant.

APPEAL FROM

SUPERIOR COURT,

DOUGLAS COUNTY,

20414.871

THE JUSTICE CLERK delivered the opinion of

the court.

This is a suit for damages brought by Willie

Proctor, appellee, for unlawful eviction and loss of

peace and chastity, against W. F. Archerston, appellant.

The first count of the declaration alleges that

appellant on September 10th, 1911, entered the flat of

appellee and with force and arms took away her goods and

chastity to the value of \$2,000. The second count al-

leges that appellant expelled appellee and her family

from said flat and kept them expelled.

Appellant filed a plea of not guilty, and a

special plea, that appellee covered rape prior to the

time mentioned in the declaration and informed appellant

that she had rented another flat, and that she had moved

her chastity.

The jury brought in a verdict for the sum of

\$500. The court rendered judgment and entered a judgment

for \$500.

It appears <sup>plaintiff</sup> from the evidence that appellee <sup>defendant</sup> had leased the flat in question from appellant; that the lease had not expired; that the rent had been paid in advance; that no notice had been given by the owner terminating the lease; that <sup>plaintiff</sup> appellee was in lawful possession, when without notice of any kind appellant <sup>defendant</sup> entered and removed the goods and chattels of appellee <sup>plaintiff</sup> to the value of \$390.59 and put a stranger in possession. The evidence also shows that <sup>plaintiff</sup> appellee made several efforts to get into the premises, but was kept locked out; that numerous efforts were made by her to find where her goods had been taken; ~~that she and the witness Reynolds called at appellant's office on the Monday following the 16th of September and offered the month's rent to Wolff, the agent, which he refused, telling her to see appellant;~~ <sup>and</sup> that all of the goods in question were lost to her without any compensation.

The main contentions of appellant are as follows:

1. Appellant had nothing to do with dispossessing appellee.
2. Appellee intended giving up the premises on Sept. 16th, and having so informed appellant at his office, it amounted to a surrender of the lease.
3. Nothing was done by appellee to get possession of her chattels from which results would have been expected.
4. The court erred in giving the 4th instruction for appellee and in refusing to give the 5th and 6th and eighth of appellant's instructions.

As to the first contention. We find that appellant testified that on September 16th he told the new tenant he would go over and see if he could get the

It appears from the evidence that appellant had leased the first in question from appellee; that the lease had not expired; that the lease had been given by the owner in reverse; that no notice had been given by the owner terminating the lease; that appellee was in lawful possession, when without notice of any kind appellant entered and removed the goods and chattels of appellee. To the value of \$250.00 and put a stranger in possession. The evidence also shows that appellee was never left to get into the premises, but was kept locked out; that numerous efforts were made by her to find where her goods had been taken; that she called at appellant's office on the 10th of September and offered the goods to be sold; the agent, who was called, telling her to come back; that all of the goods in question were found to her without any compensation.

The main contentions of appellant are as follows:

1. Appellant had nothing to do with disposing of the goods.

2. Appellee intended to give up the goods to appellant, and having so informed appellant of his office, it was his duty to accept them.

3. Nothing was done by appellee to get possession of her goods from which trouble would have been expected.

4. The court erred in giving the 4th instruction for appellee and in refusing to give the 5th and 6th and 7th of appellant's instructions.

As to the first contention, it is said that

appellant testified that on September 10th he told the new tenant he would be over and see if he could get the



key to let her get possession of the flat. At that time her moving men were waiting with a van loaded with her furniture and found the door locked. They did not wait for appellant, but got in with the aid of a gas inspector's key. Nearly all of the stranger's goods had been put in when appellant arrived.

A day or two afterwards, he was present when appellee's goods were moved and directed the men that moved them. Under the circumstances it may be safely presumed that appellant was fully aware of the eviction and removal of appellee's goods.

As to the second contention. Appellant testified that on the 8th or 10th of September appellee "came to the office and said she had decided to give up the flat." Yet he testified later on that he "never saw her until yesterday", the time of the trial. Evidently the above statement was not made to him, and appellee denies making any such remark to him. As no evidence was offered to corroborate his testimony on this question, it fails to establish his claim. In any event, it would not excuse the forcible removal and subsequent loss of her goods, under the circumstances.

As to the third contention. The argument that appellee did nothing to prevent the loss of her goods is not established by the evidence. She tried several times to get into the flat and found it locked. She says she went there "four or five times and never received an answer". She finally took a police officer on September 16th with her to get her goods and he was denied admission. The officer then went to appellant's home to see



Key to let her get possession of the file. At that time  
her moving van was waiting with a van driver who was  
waiting and found the door locked. They did not wait  
for appellant, but got in with the aid of a key. The  
key was appellant's. The key was found in the  
van when appellant arrived.

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to get into the flat and found it locked. She says she  
went there "two or three times and never received an  
answer". She finally took a police officer on September  
18th when he got her goods and he was denied admis-  
sion. The officer then went to appellant's home to see

if he could get any information, and was refused admission, and was sent away with an insulting epithet from appellant's wife. He testified, "I went to Mr. Rohrbeck's house, spoke to him through the door, but he did not answer me." The officer says he finally called at the real estate office and on Wolff, the agent, who told him he could have the goods by paying storage on them. There is no evidence that appellant made any effort to put appellee in possession of them.

As to the fourth contention. The objection made to appellee's fourth instruction is not well taken, for the reason shown above, that the evidence is insufficient to prove appellee gave notice of quitting the premises. The instruction of appellant was properly refused by the court.

The eighth instruction, "that plaintiff cannot recover vindictive damages in this case when there are no circumstances indicating insult or indignity" shown, conflicts with the decisions of our Supreme Court.

Chicago Traction Co. v. Mahoney, 230 Ill. 562;  
Ousley v. Hardin, 23 Ill. 352.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

it be unable to get any information, and was refused admission, and was sent away with an insulting attitude from appellant's wife. He testified, "I went to Mr. Schmeck's house, spoke to him through the door, but he did not answer me." The officer says he finally called at the rear outside office and on 10/11, the agent, who told him he would have the goods by putting storage on them. There is no evidence that appellant made any effort to get appellee in possession of them.

As to the fourth contention. The objection made to appellee's fourth instruction is not well taken for the reason shown above, that the evidence is insufficient to prove appellee gave notice of delinquent taxes. The instruction of appellant was properly refused by the court.

The eighth instruction, "that plaintiff cannot recover vindictive damages in this case when there are no circumstances indicating intent or indignity" shown, accords with the decisions of our supreme court.

Quinn v. Quinn, 13 Ill. 381.  
Quinn v. Quinn, 13 Ill. 381.

Finding no material error in the verdict, the judgment is affirmed.

ATTORNEYS.

THE PEOPLE OF THE STATE OF ILLINOIS, )

Defendant in Error, )

vs. )

JACK LILLINGTON, alias CLARENCE  
STRUBLE and HENRY STEAD, alias  
FRED STEAD,

Plaintiff in Error. )

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

204 I.A. 273

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff in error was indicted, found guilty, and sentenced to be imprisoned for nine months and pay a fine of \$500 and costs. // The indictment contained three counts; first, for a felonious assault with a revolver, the same being a dangerous and deadly weapon, with intent to kill and murder; second, for assault with a loaded revolver, the same being a dangerous and deadly weapon and without any considerable provocation with intent to inflict a bodily injury; third, for assault as in the second count, except that the deadly weapon was alleged to be "a certain hard substance, a further description of which is unknown". The verdict of the jury was as follows:

We, the jury, find the defendant \* \* \* guilty of assault with a deadly weapon in manner and form as charged in the indictment and we further find that said assault was committed with an intent to inflict upon the person of another a bodily injury where no considerable provocation appears and the circumstances of the assault show an abandoned and malignant heart."

It is contended by the plaintiff in error; first, that the verdict authorized a conviction for



THE COURT IN THE CASE OF 11-10000.

DEFENDANT IN CASE.

BY COURT

VS.

JACK ALLEGATION, alias CHARGED  
STURM and LARRY WARD, alias  
WARD WARD.

Plaintiff in error.

2011.1.1.213

MR. JUSTICE TAYLOR delivered the opinion of the

court.

The plaintiff in error was indicted, found guilty, and sentenced to be imprisoned for nine months and pay a fine of \$500 and costs. The indictment contained three counts; first, for a felonious assault with a revolver, the same being a dangerous and deadly weapon, with intent to kill and murder; second, for assault with a loaded revolver, the same being a dangerous and deadly weapon and without any considerable provocation with intent to inflict a bodily injury; third, for assault on the person count, except that the deadly weapon was alleged to be "a certain hard substance, a further description of which is unknown". The verdict of the jury was as follows:

"We, the jury, find the defendant guilty of assault with a deadly weapon in violation of the indictment and we further find that said assault was committed with an intent to inflict upon the person of one or more a bodily injury with no considerable provocation against and the defendant of the counts above so charged and without merit."

It is contended by the plaintiff in error, first, that the verdict contained a conviction for

simple assault only; second, that the verdict was not supported by the evidence; third, that the court erred in giving instruction number two. //

After a careful examination of the record we are of the opinion that the verdict sufficiently specifies the material facts constituting the crime of assault with a deadly weapon and that the words "of another" do not negative the allegation, that the intention was to injure Elizabeth Whipple, but were used in direct reference to her. The People v. Leman, 231 Ill. 197. The words "of another" which occur in the course of the phraseology of the verdict were evidently used to distinguish the one upon whom the assault was made from the one committing the assault; and further, the words in the verdict "as charged in the indictment" clearly designate that the one upon whom the assault was made was the one charged in the indictment, that is, Elizabeth Whipple.

The verdict is good either with reference to the second count which charges that the plaintiff in error assaulted Elizabeth Whipple with a revolver charged with gun powder and leaden bullets, the same being a deadly and dangerous weapon, or as to the third count, which is the same as the second count except that the deadly weapon is alleged to be "a certain hard substance, a further description of which is unknown."

Considering the verdict with reference to the second count, the jury was justified by reason of the testimony of Elizabeth Whipple to the effect that Lillington, alias Struble, pointed a revolver at her head and said: "Get out of here you --- or I will blow your brains out",

... and the ...

1985-1986

in all cases, the same result is obtained.

Also, the following is a list of the names of the persons who have been named in the above-mentioned affidavits as having been in the possession of the same at the time of the same being seized:



in concluding that the revolver was loaded.

The verdict would also be good when considered in reference to the third count inasmuch as the revolver was introduced in evidence and the jury had an opportunity to determine whether or not the revolver in question was a hard substance as set out in the indictment.

Plaintiff in error contends that the court erred in giving instruction number 2. The record shows that the jury were instructed as a matter of law, not only on the charge of assault with a deadly weapon, but also on the charge of assault with the intention to commit murder and simple assault. We are of the opinion that the evidence in the case clearly justified the court in giving instruction number 2 as to what constituted the crime of assault with a deadly weapon of which the plaintiff in error was found guilty.

It is claimed by the plaintiff in error that the verdict was not supported by the evidence; that it was not shown that the revolver was not used as a bludgeon; that it was not shown that it was loaded as charged in the second count of the indictment; that there was no proof that Stead used a deadly weapon or had any intention of harming Elizabeth Whipple with a weapon and that there was no evidence of an intention to inflict a bodily injury on Elizabeth Whipple.

We are of the opinion, however, that the evidence, bearing in mind particularly the testimony of Elizabeth Whipple, which was corroborated in part, at least, by a number of other witnesses, justified the verdict. The



in concluding that the receiver was loaded.

The receiver was also in good condition in reference to the firing mechanism as the receiver was introduced in evidence and the fact that on examination it was determined that the receiver is loaded was a fact established as not in the indictment.

Examination in further evidence that the receiver was in firing condition, number 2. The receiver was then the fact was introduced as a matter of fact, not only as the change of position with a loaded receiver, but also as the change of position with the receiver in firing position. It is of the opinion that the receiver in the case already testified was found in firing position, number 2 as to which established the crime of murder with a deadly weapon of which the quantity in fact was found.

It is stated by the witness in answer that the receiver was not loaded by the witness; that it was not known that the receiver was not loaded as a receiver; that it was not shown that it was loaded as stated in the indictment; that there was no proof that the receiver was not loaded as stated in the indictment; that the receiver was not loaded as stated in the indictment; that the receiver was not loaded as stated in the indictment.

On the part of the witness, however, that the witness testified in answer to the question of whether or not the receiver was loaded as stated in the indictment, that the receiver was not loaded as stated in the indictment.

claim of the plaintiff in error that the sentence was excessive is, in our opinion, untenable.

The judgment of the trial court and the verdict of the jury is, therefore, affirmed.

**AFFIRMED.**

claim of the plaintiff in view that the plaintiff was  
known to be, in fact, a minor, and

The judgment of the trial court and the verdict  
of the jury is, therefore, affirmed.

APPROVED.

HARRY A. BIOSSAT,  
Defendant in Error,

vs.

B. S. LIPPINCOTT,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 283

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on an account assigned to him by John J. Sweet, on which Sweet claimed an indebtedness from defendant for repairing a hotel and some cottages near Ingleside, Illinois, at an agreed price of \$400, which work, it was said, was completed and accepted by the defendant in May, 1913. The account was assigned by Sweet to plaintiff on September 9, 1915. Upon trial by the court plaintiff had judgment for \$350.

The crux of this controversy is as to the contract between Sweet and the defendant. If Sweet's version of the same, as presented by plaintiff's counsel, is established by the evidence it cannot reasonably be said that he has not substantially complied with it; on the other hand, if the contract was as claimed by the defendant, it is proven by the evidence that it was not substantially complied with.

Defendant is the owner of the Lippincott Hotel, with five cottages adjacent, near Ingleside, Illinois. In the spring of 1913 he wished to have some repairing done on these houses. To this end he first had some negotiations with a Mr. Spikings, who drew a plat indicating the work that was to be done. As Spikings could not do the work for some time, and the defendant was in somewhat of a hurry, negotiations were commenced with Mr. Sweet. The defendant



WILLIAM A. BLOOM, Plaintiff in Error,  
vs.  
H. E. LINDGREN, Defendant in Error.

2011-1-288

MR. PRESIDING JUSTICE ROBERTS  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on an account assigned to him by John J. Sweet, on which Sweet claimed an indebtedness from defendant for repairing a hotel and some cottages near Lakeside, Illinois, at an agreed price of \$400, which work, it was said, was completed and accepted by the defendant in May, 1913. The account was assigned by Sweet to plaintiff on September 9, 1913. Upon trial by the court plaintiff had judgment for \$350.

The crux of this controversy is as to the contract between Sweet and the defendant. If Sweet's version of the same, as presented by plaintiff's counsel, is established by the evidence it cannot reasonably be said that he has not substantially complied with it; on the other hand, if the contract was as claimed by the defendant, it is proven by the evidence that it was not substantially complied with. Defendant is the owner of the Lakeside Hotel, with five cottages adjacent, near Lakeside, Illinois. In the spring of 1913 he wished to have some repairing done on these houses. To this end he first had some negotiations with a Mr. Spinkins, who drew a plan indicating the work that was to be done. As Spinkins could not do the work for some time, and the defendant was in somewhat of a hurry, negotiations were commenced with Mr. Sweet. The defendant

left the plat showing the repairs with Mrs. Cirkle, the tenant of the hotel; Sweet and Mrs. Cirkle inspected the premises as to the contemplated work. Afterwards Sweet had a conversation with defendant over the telephone, in which the price of \$400 was agreed upon. Defendant claims that Sweet undertook to make the repairs indicated upon the plat; Sweet says that he was to do only the work pointed out by Mrs. Cirkle and that "we were not to go by that plat; that was not the contract."

The evidence tending to support the defendant's theory as to the contract is that he left the plat with Mrs. Cirkle to be shown to Sweet when he came to figure on the work; that at the time of Sweet's interview with Mrs. Cirkle she called his attention to the plat. Sweet testified, "She handed it to me and we looked it over, and in the conversation she said, 'you have to follow that.'" She also gave him the plat, which he took away with him. This is corroborated by Mrs. Cirkle. It is also corroborated by the testimony of the defendant, who says that in his telephone conversation with Sweet he inquired if Sweet had figured on everything, to which he replied that he had. Sweet kept the plat but did not deliver it to any of the workmen who were sent to do the work, nor inform them of its contents, and he himself did not go near the work until after his men had withdrawn.

It is sought by the plaintiff to ignore the repairs indicated by the plat, and to confine himself only to those things which he says were pointed out to Sweet by Mrs. Cirkle.

We have reached the conclusion that the clear preponderance of the evidence proves that the plat, with the figures and marks thereon, was the basis of the contract.

that the first showing the picture was Mrs. Calkins, the  
tenant of the hotel; Sweet and Mrs. Calkins had been the  
partners as to the contemplated work. Afterward Sweet had  
a conversation with defendant over the telephone, in which  
the price of \$400 was agreed upon. Defendant claimed that  
Sweet undertook to make the repairs indicated upon the  
plan; Sweet says that he was to do only the work pointed  
out by Mrs. Calkins and that "we were not to do any other  
work; that was not the contract."

The evidence tending to support the defendant's  
theory as to the contract is that he told the plan and that  
Calkins to be shown to Sweet when he came to figure on the  
work; that at the time of Sweet's interview with Mrs. Calkins,  
she called his attention to the plan. Sweet testified,  
"The number is to be and we looked it over, and in the con-  
versation she said, 'You have to follow that.' " and also  
have him the plan, which he took away with him. This is  
corroborated by Mrs. Calkins. It is also corroborated by  
the testimony of the defendant, who says that in the tele-  
phone conversation with Sweet he indicated it Sweet had  
figured on everything, to which he replied that he had.  
Sweet says the plan was not delivered to any of the  
workmen who were sent to do the work, nor taken down of  
its contents, and he himself did not go near the work until  
after the work was finished.

It is held by the plaintiff to remove the re-  
pairs indicated by the plan, and to certify himself only to  
those things which he says were pointed out to Sweet by Mrs.  
Calkins.

To have removed the condition that the plan  
preponderance of the evidence proves that the plan, with  
the figures and marks thereon, was the basis of the contract.



It certainly was so understood by the defendant in his telephone conversation with Sweet, in which Sweet's offer was accepted, and the only reasonable inference from the testimony of both of Sweet and Mrs. Cirkle was that Sweet himself had in mind the work indicated on the plat. It is unreasonable to say that Sweet was undertaking to do only what Mrs. Cirkle verbally pointed out, without any definite statement as to what this was. It is patent that the plat was used both by Mrs. Cirkle and Sweet and that the work "pointed out" had reference to the work shown on the plat and its location on the buildings.

It is not contended by plaintiff that Sweet complied in any substantial way with the work shown by the plat. Among other items was a considerable number of new posts under the porches; only a few new posts were put in by Sweet. At other points, where the plat indicated that new lumber should be used, Sweet used old lumber. It is unnecessary to note other details called for by the plat which were not performed by Sweet. There was evidence tending to show that it was necessary to do all of this work over again the following year. It was also shown that the defendant, after Sweet's workmen had been working for about three days, finding that it was not being done as agreed upon, ordered that the work be stopped but that Mr. Sweet paid no attention to this order.

Plaintiff has not sued upon a quantum meruit, and there is no evidence to support such a claim; the suit is brought upon a contract for an agreed sum, and unless substantial compliance has been shown plaintiff cannot recover. Keeler v. Herr, 157 Ill. 57.

Holding, as we do, that plaintiff has failed to show the performance of the contract proven to have been the contract entered into between Mr. Sweet and the defendant, the judgment is reversed without remanding.

REVERSED.



It certainly was so understood by the defendant in his telephone conversation with Sweet, in which Sweet's offer was accepted, and the only reason is inferred from the testimony of both of Sweet and Mrs. Little that Sweet himself had in mind the work indicated on the plat. It is unreasonable to say that Sweet was undertaking to do only what Mrs. Little verbally pointed out, without any definite statement as to what this was. It is patent that the plat was used both by Mrs. Little and Sweet and that the work "pointed out" had reference to the work shown on the plat and its location on the building.

It is not contended by plaintiff that Sweet complied in any substantial way with the work shown by the plat. Among other items was a considerable number of new posts under the porch; only a few new posts were put in by Sweet. At other points, where the plat indicated that new lumber should be used, Sweet used old lumber. It is unnecessary to note other details called for by the plat which were not performed by Sweet. There was evidence tending to show that it was necessary to do all of this work over again the following year. It was also shown that the defendant, after Sweet's workmen had been working for about three days, finding that it was not being done as agreed upon, ordered that the work be stopped but that Sweet paid no attention to this order.

Plaintiff has not cited even a quantum meruit, and there is no evidence to support such a claim; the suit is brought upon a contract for an agreed sum, and unless substantial compliance has been shown plaintiff cannot recover.

Kaiser v. Hart, 127 Ill. 27.

Holding, as we do, that plaintiff has failed to show the performance of the contract proven to have been the contract entered into between Mr. Sweet and the defendant, the judgment is reversed without remanding.

REVEREND.

251 - 22685

FRANK A. VICKERS, trading as  
F. A. Vickers & Co.,  
Appellee,

vs.

W. W. VAUGHAN COMPANY,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 284

MR. PRESIDING JUSTICE MESURELY  
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in attachment against the defendant for \$101.15. The affidavit of attachment alleged the nonresidence of the defendant and an indebtedness of \$107 upon an open account for commissions, as agent, for the procuring of purchasers for the sale of merchandise shown by an itemized statement attached. Defendant admitted that there was due to the plaintiff upon certain of these items the sum of \$31.25, which was tendered and paid into court. The question in controversy is whether there is anything due on the alleged sale of merchandise, that is, tomato catsup, to Steele Wedeles & Company.

The contract between the plaintiff and the defendant provides that plaintiff was to act as the agent of defendant in the sale of its products upon commission. The evidence shows that the commission was to be paid on orders on which goods were shipped out, but that on orders canceled or not filled no commission was to be paid. Afterwards the order from Steele Wedeles & Company was obtained by the plaintiff, which order was in writing and was accepted by the defendant. It provided for the sale of 1,000 cases of pure tomato catsup, at 67½ cents per dozen, f.o.b. cars Chicago, and "subject to approval of sample of 1915 pack." It is

W. A. VICTOR & CO.,  
Appellants,  
vs.  
W. A. VICTOR & CO.,  
Appellants.

THE HONORABLE JUSTICE ROBERT  
IN THE OPINION OF THE COURT.

This is an appeal from a judgment in the  
against the defendant for \$101.15. The plaintiff for re-  
tendant alleged the nonexistence of the defendant was an in-  
dependence of 1917 upon an open account for commission, as  
agent, for the procuring of purchasers for the sale of mar-  
condemned shown by an alleged statement attached. Defendant  
admitted that there was no sale of the plaintiff upon certain of  
these items the sum of \$101.15, which was rendered and paid  
into court. The question is whether there is a controversy  
anything due on the alleged sale of commission, that is,  
to make certain, to make certain a company.

The contract between the plaintiff and the de-  
fendant provides that plaintiff was to act as the agent of  
defendant in the sale of the produce upon commission. The  
evidence shows that the commission was paid to plaintiff on  
which goods were shipped out, and that an invoice was sent out  
not filed in conclusion was to be paid. Plaintiff has not  
not that these goods were shipped to defendant by the de-  
fendant, which were in transit and were accepted by the de-  
fendant. It provided for the sale of 1,000 cases of pro-  
duce, at 10% commission, to be paid on delivery, and subject to approval of sample of 1000 cases. It is



shown by the evidence that the defendant sent to plaintiff for submission to Steele Wedeles & Co. samples of the catsup which it proposed to ship, and that both plaintiff and Steele Wedeles & Co. advised the defendant that the samples were not satisfactory; that defendant then wrote to plaintiff that they would accept the cancellation of the order and go no further in the matter. The answer was that the matter would be considered closed.

Many points are presented by the attorneys for the defendant, but we think it is sufficient to note that under the contract between plaintiff and the defendant no commissions on the Steele Wedeles order should be allowed for the reason that this order was merely conditional and subject to cancellation at the option of the buyer. The sale having been made subject to the approval of samples by the buyer, when the seller was notified that the samples were unsatisfactory and that they failed to receive the approval of the proposed purchaser, there was no obligation on either of the parties to proceed further.

In Goodrich v. Van Nortwick, 43 Ill. 45, the contract was with reference to a mill, and the agreement was that if the mill suited the purchaser he was to pay for it, otherwise not, and the court held that "if it did not suit appellee, then he had the right to return the property, and he was by the terms of the contract to be the sole judge of whether it suited him. See, also, Dvorak v. Prucha, 156 Ill. App. 514.

We do not understand the rule to be that in a contract of this sort it must be shown by the evidence that the buyer had some reasonable ground for finding the samples unsatisfactory. We should think that in an article of this





kind, where the peculiar tastes and requirements of the trade were to be considered, the judgment of the buyer must be conclusive.

Cases cited by plaintiff with reference to the rule that where a broker brings the principals together into a binding contract which is subsequently canceled, he is nevertheless entitled to his commissions, are not in point. These cases, generally speaking, have to do with real estate transactions, and even here there are many decisions to the effect that where the contract for commissions is conditioned upon the actual consummation of the deal, which subsequently fails, the broker is not entitled to commissions. In the instant case the commissions were to be "on net results obtained," and it would be unreasonable to permit commissions on merely conditional orders which never merged into sales.

We are of the opinion that the amount tendered and paid into court, namely \$31.25, is the correct amount due to the plaintiff; and the judgment of the trial court is reversed and judgment against the defendant is entered in this court for \$31.25, costs to be taxed against the appellee.

REVERSED AND JUDGMENT HERE.

kind, where the peculiar facts and circumstances of the case were to be considered, the judgment of the court must be conclusive.

Cases cited by plaintiff are referred to the rule that where a broker brings the principal to a binding contract which is subsequently rescinded, he is nevertheless entitled to his commission, not at the date those cases, generally speaking, have to do with real estate transactions, and even here they are not applicable to the effect that where the contract for commission is conditional upon the actual consummation of the deal, which subsequently fails, the broker is not entitled to commission. In the instant case the commissions were to be "on net results obtained," and it would be unreasonable to permit commission on merely conditional orders which never were made good. We are of the opinion that the court should have and said that court, namely 21.22, is the correct amount due to the plaintiff; and the judgment of the trial court is reversed and judgment against the defendant is entered in this court for 21.22, costs to be taxed against the appellee.

REVEREND AND HONORABLE JUDGE.

JAMES F. BISHOP, Admr. Estate  
of ANNA TEMKIN, Deceased,  
Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY,  
Appellee.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

204 I.A. 286

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for the death of Anna Temkin, said to have been caused by one of defendant's street cars. At the conclusion of the plaintiff's evidence, upon motion of the defendant the court instructed the jury to return a verdict in favor of defendant, and judgment was entered upon such a verdict. From this plaintiff has appealed.

The only point presented as ground for reversal is the action of the court in refusing to admit a certified copy of the death certificate issued by the attending physician, supported by a section of the statute of the State of Wisconsin with reference to death certificates. We hardly feel called upon to discuss this point, for whether we should hold that these documents were competent evidence or otherwise, upon the record before us, we should be compelled to affirm the judgment.

The declaration contained four counts, with the usual allegations of care for her own safety on the part of deceased, and the negligent operation of one of the cars of defendant which ran into plaintiff's intestate and injured her so that she died. Defendant filed a plea of not guilty, and a special plea denying the ownership and control of the



CHICAGO CITY RAILWAY COMPANY,  
Appellee.  
vs.  
JAMES E. BROWN, Plaintiff,  
of ALMA TOWNSHIP, Cook County,  
Illinois.

COOK COUNTY.

2041A-286

IN REPLY TO THE ANSWER OF THE DEFENDANT  
FILED IN THE COURT OF THE COUNTY OF COOK.

The defendant's answer is in reply to the complaint filed by the plaintiff in the above entitled cause. At the conclusion of the trial, the jury returned a verdict in favor of the plaintiff, and judgment was entered upon such verdict. From said judgment the plaintiff has appealed.

The only point presented as ground for reversal is the action of the court in refusing to admit a certified copy of the death certificate issued by the attending physician, supported by a section of the statute of the State of Wisconsin with reference to death certificates. It is respectfully submitted upon this point, for whether we should hold that such documents were competent evidence or not, when the record before us, we should be governed by the ruling of the court.

The death certificate was admitted for evidence, with the usual objections of counsel for the defendant on the part of the plaintiff, and the defendant's objection of one of the parts of the certificate was sustained. The plaintiff's counsel and the defendant's counsel both filed a bill of exceptions, but as that was denied, the plaintiff filed a bill of exceptions, and a special issue was given for the purpose of settling the

street railway or the car in question. There was no evidence whatever introduced tending to support either the allegation concerning the deceased's care, the negligence of the defendant or its ownership of the car. The only thing said by anyone concerning the manner of the accident is contained in a stipulation as to what a certain witness would testify were he present. It is unnecessary to analyze this stipulation, for it is so ambiguous and uncertain as to give very little, if any, information as to the occurrence; it cannot possibly be claimed to support those things which the plaintiff in an action of this sort is bound to prove.

For the reason that there was no evidence to go to the jury, it was proper for the court peremptorily to instruct the jury to find for the defendant.

While it is not necessary to our decision, we feel free to say that we are of the opinion that the exclusion of the documents presented on behalf of plaintiff was not error. The fact that plaintiff's intestate died on the date shown by the offered certificate was admitted by defendant's counsel. The physician's certificate also contained a statement that the cause of death was that the intestate had been run over by a street car. The accident took place in Chicago on October 14, 1912; the physician signing the certificate attended the intestate from January 28th to January 28th, 1913, in Wisconsin; manifestly any statement made by him as to the accident would be merely hearsay.

In Howard v. Illinois Trust & Savings Bank, 189 Ill. 568, it was said, in substance, that only those parts of official registers should be admitted which include facts within the actual knowledge of the physician making the return, the court saying, "The return is not evidence of matters of mere hearsay gathered up by the physician of which he

street railway or the car in question. There was no evi-  
dence whatever introduced tending to support either the af-  
firmation concerning the deceased's conduct, the negligence of  
the defendant or its ownership of the car. The only thing  
said by anyone concerning the number of the vehicle is con-  
tained in a stipulation as to what a certain witness would  
testify were he present. It is unnecessary to analyze this  
stipulation, for it is as ambiguous and uncertain as is any  
very little, it may, information as to the circumstances; it  
cannot possibly be claimed to support those things which  
the plaintiff in an action of this sort is bound to prove.  
For the reason that there was no evidence to go  
to the jury, it was proper for the court summarily to in-  
struct the jury to find for the defendant.  
While it is not necessary to our decision, we  
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the certificate resided at the intestate from January 28th  
to January 29th, 1913, in Wisconsin; manifestly any statement  
made by him as to the accident would be merely hearsay.  
In Scott v. Illinois Trust & Savings Bank, 103  
Ill. 506, it was held, in substance, that only those facts of  
official nature should be admitted which involve facts  
within the actual knowledge of the physician making the re-  
turn, the court saying, "The return is not evidence of matters  
of mere hearsay gathered up by the physician of which he



knows nothing."

A large number of cases support the contention of the defendant that death certificates are not admissible for the purpose of showing some collateral fact as the cause of death; among such cases are Metropolitan Life Ins. Co. v. Morabec, 116 Ill. App. 271; Beglin v. Metropolitan Life Ins. Co., 173 N. Y. 374; Painton v. Cavanaugh, 135 N. Y. Supp. 418; Gorham Co. v. United Engineering Co., 202 N. Y. 342; Garvan v. N. Y. C. & H. R. R. Co., 210 Mass. 275, and Pence v. Meyers, 180 Ind. 282. In Rohloff v. Aid Association for Lutherans, 150 Wis. 61, a similar certificate of death made by a physician and filed in the registrar's office was held to be incompetent on the ground that it was not the best evidence of the cause of death. Our own Supreme Court, in Novitsky v. Knickerbocker Ice Co., 276 Ill. 102, has very recently restated the rule that the verdict of a coroner's jury is not admissible for the purpose of fixing civil liability of anyone growing out of an accident resulting in death, "except in so far as the finding required by the statute to be made may have such effect."

In granting the motion of the defendant the trial court acted properly, and the judgment is affirmed.

**AFFIRMED.**



"known parties."

A large number of cases support the contention

of the defendant that death certificates are not admissible for the purpose of showing some collateral fact as the cause of death; among such cases are Reynolds v. Life Ins. Co. v. Western, 112 Ill. App. 271; Keelin v. Northwestern

Life Ins. Co., 173 N. Y. 374; Winters v. Northwestern, 135

N. Y. App. Div. 418; Norham Co. v. United Northwestern Co., 302

N. Y. App. Div. 418; Quinn v. N. Y. G. & R. Co., 210 Mass. 475,

and Worcester v. Western, 120 Ind. 264. In Wohl v. Life Ins.

association for Insurance, 130 Wis. 47, a similar certificate

of death made by a physician and filed in the registrar's

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fixing civil liability of anyone growing out of an accident

resulting in death, "except in so far as the finding results

by the statute to be made may have such effect."

In granting the motion of the defendant the trial

court acted properly, and the judgment is affirmed.

Affirmed.

MARGARET C. McNEILL and BENJAMIN  
F. McNEILL,

Appellants,

vs.

RIVERS McNEILL and ELLEN M. CRUDUP.  
Appellees.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

204 I.A. 287

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Complainants by their bill sought to establish a trust growing out of certain transactions between them and the defendants, who answered denying the essential allegations of the bill, invoked the Statute of Frauds as to an express trust, and averred laches in bringing the action. After hearing, the chancellor ordered the bill dismissed for want of equity. The propriety of this order is brought before us by appeal.

The complainants are husband and wife, and Benjamin F. McNeill is an older brother of the defendants, Rivers McNeill and Ellen M. Crudup; at the time of the transaction hereinafter narrated Mrs. Crudup lived in North Carolina, the other parties in Chicago.

The record shows that in May, 1898, Benjamin F. McNeill acquired a piece of land in Chicago and placed the title in the name of his wife, Margaret C. McNeill. In July, 1898, he obtained a loan of \$8,000 on this property; he paid no interest, and foreclosure followed, with a sale to the mortgagees October 25, 1899, for \$9,587.51. The time for complainants as mortgagors to redeem from this sale would expire on October 25, 1900. In October, and shortly before the expiration of this redemption period, Benjamin sought out his brother Rivers and solicited him to help save

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U. S. DEPARTMENT OF JUSTICE

2017.11.05

RECEIVED BY THE DIRECTOR OF THE BUREAU OF INVESTIGATION  
U. S. DEPARTMENT OF JUSTICE

On October 10, 1935, the following information was received from the Bureau of Investigation, New York City, regarding the activities of the "American People's Party" (APP) in the New York City area. The APP is a political party which was organized in 1934 and has since that time been active in the New York City area. The APP is a political party which was organized in 1934 and has since that time been active in the New York City area. The APP is a political party which was organized in 1934 and has since that time been active in the New York City area.

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the property from an impending total loss due to the expiration of their period of redemption. Pursuant to this Rivers had an interview with the representatives of the holders of the master's certificate, with whom he made arrangements to extend the period of redemption for one year. The defendants, to procure this extension of time, paid \$3,400 of their own money, which was to apply on any redemption that the defendants might make. Benjamin and his wife were told that they must get a purchaser within that extended time, and if not, defendants would have to protect the advance of their own money by putting up the balance due under the foreclosure and obtaining the title for themselves and on their own account. The complainants were told that if this should happen they, the complainants, would have no further interest in the property. If, however, complainants should find a purchaser within the year, then all that defendants wanted was their original advance of money and expenses back, with six per cent. interest. Complainants agreed to this arrangement, and it was finally settled in its details, nearly two months after the equity of redemption of the mortgagors had ceased, in the office of Mr. Granville W. Browning, an attorney, who represented the holders of the certificate. The details of this plan were left to Mr. Browning, who required that complainants should give a quit claim deed to the defendants conveying whatever interest they might have in the property. Thereupon the defendants carried out their agreement by depositing about \$3,400 with the holders of the certificate and obtaining the extension of time.



the property from an immediate legal title and an immediate  
 loss of their rights of redemption. Therefore at this time  
 had an interview with the representatives of the insurance  
 the mortgage certificate, with which he made arrangements to  
 extend the period of redemption for one year. The following  
 date, to secure this extension of time, paid \$1,400 in cash  
 and money, which was to apply on any mortgage that the  
 defendants might make. Benjamin and his wife were told  
 that they were not a mortgagee since that extended time,  
 and if not, defendants would have to protect the mortgage  
 of their own money by selling up the balance the money had  
 defendants had obtained the title for themselves and no  
 their own account. The defendants were told that if  
 this should happen when the mortgage, would have no  
 further interest in the property. It, however, remained  
 same should find a purchaser within one year, then all the  
 defendants would see their original advance of money and  
 interest paid, with six per cent. interest. Defendants  
 agreed to this arrangement, and it was finally settled in  
 its details, nearly two months after the date of receipt  
 from of the mortgage had been made. In the latter of the  
 January 11, 1907, an abstract was prepared and represented the  
 date of the certificate. The details of this time were  
 left to Mr. Overholser, who reported that everything was  
 given a full title deed to the defendants covering delivery  
 interest that should have in the property. Therefore the  
 defendants carried out their agreement by delivering about  
 \$1,400 with the balance at the certificate and obtaining  
 the extension of time.

During this extended period complainants made attempts to procure a purchaser for the property but without success. In January, 1902, there having been no sale and no redemption being made, the defendants advanced to the holders of the certificate the balance due on the certificate and obtained its transfer to themselves, and master's deeds to the property were issued to them, all of which was known to the complainants, who thereupon ceased to attempt to secure a purchaser. From this time on the defendants treated the property in all respects as their own, and complainants ceased entirely to have any connection therewith or to assert any claim of any interest therein. In January, 1911, defendants sold the property for \$43,400.

For a number of years before this sale numerous letters passed between the complainants, who then lived in Grand Rapids, Michigan, and Rivers McNeill, which indicated that the complainants were in financial stress, and asking Rivers for assistance. No claims were made at any time based upon any right or interest in the real estate in question or by reason of the above transaction. After the sale these written appeals for assistance continued, still unaccompanied by any suggestion of any claim or right. In May, 1914, over fourteen years after the first request by Benjamin McNeill upon Rivers to assist him to save the property, a demand was made upon Rivers for about \$25,000, on the theory that he was obligated to complainants to this amount by virtue of a trust.

The bill filed charges that Rivers McNeill agreed for himself and his sister, Mrs. Crudup, that he would pay for and take over the property involved and hold it until a desirable sale could be made, and then account for the proceeds to the complainants; that he did take the

During this extended period complaints were  
 attempts to procure a replacement for the property but with-  
 out success. In January, 1934, there having been no sign  
 and no replacement being made, the defendant advised in the  
 interest of the village the balance due on the mortgage  
 and obtained the balance on December, and seller's share  
 of the property were issued to him, all of which was known  
 to the complainant, who thereupon caused to attempt to re-  
 cover a balance. When this time on the defendant's account  
 the property is all together in their own, and complainant  
 general advice to have any conversation therewith as to the  
 sale any kind of any interest therein. In January, 1934,  
 defendant with the property for \$42,400.

For a number of years before this sale mentioned  
 factors passed between the complainant, who then lived in  
 Street South, Alameda, and River Street, where indicated  
 that the complainant was in financial straits, and selling  
 River for settlement. In claim was made at that time  
 based upon the fact of interest in the real estate in ques-  
 tion at the time of the above transaction. After the sale  
 there existed dispute for settlement, which was  
 resolved by the resolution of the state of Idaho. In  
 May, 1934, over fourteen years after the first payment of  
 defendant's share of the River to the state he was told  
 that a balance was due upon River for about \$20,000,  
 on the theory that he was entitled to complainant to take  
 amount of value of a third.

The ill filed charges that River should  
 amount for Alameda and the River, that River, that he  
 would pay for and take over the property involved and said  
 it will a settlement be made, and then account  
 for the proceeds to the complainant, that he did take the



property and afterwards sold it, but failed to account.

We are of the opinion that this allegation of the bill is not supported by the evidence. After considering the variant testimony as to the transaction, we are of the opinion that the chancellor was fully justified in concluding that the claims of the complainants were not proven but that rather the more convincing evidence showed that the arrangement was as above stated, that is, that the money was advanced simply to secure an extension of time within which the complainants might act with a view to saving the property, but that if they were unable to accomplish this defendants were, by making further advances, to take the property as their own. We think also that even if the promise was as claimed by complainants the Statute of Frauds would prevent its enforcement. Ryder v. Ryder, 244 Ill. 297, is precisely in point, the court saying of facts similar to those before us: "There can be no recovery by the complainants in this case as said agreement would be within the Statute of Frauds, and the Statute of Frauds having been pleaded there could be no recovery, as such an agreement could not be legally established by parol testimony."

The bill also charges that Rivers McNeill, either by fraud or by abuse of a fiduciary relation, obtained the property from complainants which they would not otherwise have parted with, and which he should now in equity be compelled to account for on the theory of a constructive trust. In Alwood v. Mansfield, 59 Ill. 496, 507, the court quotes with approval the definition of a constructive trust given in Hill on Trustees, 144, as follows:

"Whenever the circumstances of a transaction are such that the person who takes the legal estate in



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10-11-1964

the bill is for a full set of letters and a negative.

for the purpose of the investigation, as was the

the nation's first. The president was elected in 1960.

Number of pages: 100

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1990年12月15日，在北京市召开的“中国人口科学大会”上，李振球代表中国科学院人口研究所作了题为“中国人口科学研究的现状与展望”的报告。报告指出，中国人口科学研究的现状是：人口科学的研究队伍正在壮大，研究领域正在拓宽，研究方法正在改进，研究成果正在积累。报告还指出，中国人口科学研究的展望是：人口科学的研究队伍将继续壮大，研究领域将继续拓宽，研究方法将继续改进，研究成果将继续积累。

CONFIDENTIAL

The description is right out of a novel in which the story-

etc., but that it they were unable to accomplish this.

Estimated cost, by adding further advances, to take the

and I have told you of my visit to the ...

It is not possible to determine the exact date of the first publication of the book, but it is known that it was published in the early 19th century.

10-10-1964

20. 1/10/1961. From 11.45 to 12.15. 100. 100. 100.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

*[Faint, illegible text]*

TO: DIRECTOR, FBI WASH., D.C. FROM: SAC, NEW YORK (100-155555) (P)  
SUBJECT: JAMES EARL RAY, AKA; MURDER OF MARTIN LUTHER KING, JR.;  
RE: NEW YORK TELETYPE TO BUREAU, APRIL 11, 1968.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a number of important consequences for the development of the United States.

Each of these groups has a different set of interests and a different set of resources. The interests of the different groups are often in conflict, and the resources of the different groups are often in conflict. The interests of the different groups are often in conflict, and the resources of the different groups are often in conflict.

\* Omitted for brevity.

The bill also contains the following:

—no, military capability is to ensure the safety of people

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...and the ...

and a 50 percent reduction in the number of deaths.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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property, can not also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who, in equity, are entitled to the beneficial enjoyment."

In Reed v. Reed, 133 Ill. 482, our court approves the definition given in Ferry on Trusts, section 27, as follows:

"A constructive trust is one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself."

There are many decisions in our courts dealing with the subject of constructive trusts. In Miller v. Miller, 266 Ill. 522, after a full discussion of the subject and of decided cases, the court divides constructive trusts generally into (1) those cases in which there is actual fraud giving rise on equitable grounds to a constructive trust, and (2) cases in which there is a confidential relation and a subsequent abuse of this relation.

Applying these definitions to the transaction before us, it cannot be said with any substantial support that any actual fraud has been shown. Neither do we find the existence of either any confidential relation between the parties or any abuse thereof. The only possible basis for the claim of the existence of any confidential relation is found in the fact that Benjamin McNeill is a brother of the defendants. To hold that as a matter of law this relationship alone gave the transaction a fiduciary character, would make it dangerous for persons related by family ties to deal with each other in an ordinary business transaction. That the mere relationship of the parties is not sufficient has been held in Dick v. Albers, 243 Ill. 231, wherein the court said: "The relationship existing between father and son where the son is an adult and doing business for himself





is not necessarily a fiduciary relation to which the <sup>equitable</sup> doctrine of constructive trusts is applicable." There is no other showing which even remotely tends to support the claim of fiduciary relations. The parties did not live together, and sustained no relations except of ordinary friendliness; they were entirely independent of each other; there were no joint interests in real estate except that they all inherited property from their grandfather, which was divided in the year 1885, the interests thereafter remaining entirely separate and distinct. Complainant himself testifies that he never had any dealings with Rivers McNeill in real estate. There were no mutual business relations of any kind whatever. Neither can it be said that Rivers possessed any superior knowledge or ability in real estate transactions which would give rise to any special confidence or trust in him. Benjamin was equally if not better informed as to real estate in Chicago than was Rivers, and their experience was very much alike. There is no element whatever in the transaction giving rise to any special fiduciary relations between them, except those elements which exist in any business transaction. The whole matter was simply an attempt by the defendants, at the solicitation of the complainants, to obtain for the complainants a further time in which to dispose of the property, and the defendants accomplished all that they undertook to do, not because of any special trust or confidence reposed in them by complainants but simply as a matter of brotherly and sisterly friendliness.

In Biggins v. Biggins, 133 Ill. 211, the court had under consideration a conveyance by a brother to a sister, where it was sought to establish a confidential relation between the parties in which a court of equity ought to interfere and establish a trust. The court declined to in-



is not necessarily a limitation, existing in relation to the  
of observation which is made in the field. There is no  
knowing when even the best of us are not in the field of  
liberally tolerated. The history and the law of the  
concerned on religious grounds of religious freedom;  
more with religious toleration of each other; but we  
joint tolerance in that sense which would not be  
provided properly from both branches, which was limited  
in the past, and the history of religious freedom  
which separates and divides. Religious freedom  
that we have had and which we have not had in the  
past, there were no special religious toleration of any kind  
whatever. But now it is said that there is no such thing  
as religious toleration or liberty in that sense. Religious  
which would give us the special toleration of each other  
and. Religious toleration is not better tolerated in the  
case in which we have it, and which toleration has  
very much alike. There is no element of toleration in the  
which living time to the special religious toleration  
which we have, which those elements which we have  
and toleration. The whole matter was simply an attempt to  
the toleration, or the toleration of the toleration, in  
which for the toleration of the toleration in the  
case of the toleration, and the toleration of the toleration  
that they maintain to be, and which is not toleration  
of toleration which is not by toleration but which  
is a matter of principle and liberty of religion.

In Shirley v. Shirley, 101 N. H. 101, the court  
and under consideration a controversy as to property in a  
fact, which is not sought to establish a constitutional prin-  
ple between the parties in which a court of equity would be  
interested and established a trust. The court declined to

editors  
of the

terfere.

In Bullenkamp v. Bullenkamp, 60 N. Y. Supp. 64, the facts were very much like those before us, and the court said:

"It clearly appeared that, without some such measure as was resorted to, the property would necessarily be lost. This situation was just as well understood by the plaintiff as by her brother; and the conveyance, in this view, was as well understood by the plaintiff to be for the purpose of enabling the brother to obtain the money and preserve the property, as it was by the brother or any other person connected with the transaction. Undoubtedly the plaintiff thought, and perhaps believed, that by reason of taking such steps her brother would be enabled to preserve the property for her by his subsequent handling of the same; and, as this seemed at this time to be the only means by which anything could be saved to any of the parties, the plaintiff consented to such arrangement. Both of these persons were of mature age, and dealt, as the evidence conclusively establishes, upon terms of equality."

Counsel for the complainants devote the larger part of their brief and argument to the contention that the quit claim deed given in December, 1900, by complainants to defendants, though absolute in form was in fact a mortgage. No reasonable consideration is advanced to support this theory. The evidence of the transaction entirely negatives the conclusion that there was any loan made to any one; the testimony is all in harmony on this point. It has been held many times that before a conveyance absolute on its face can be transformed into a mortgage a clear and satisfactory intent to this effect must be shown. May v. May, 158 Ill. 209; Williams v. Williams, 180 Ill. 361, and cases cited. There being no loan between the parties, there was therefore nothing in the nature of a subsisting debt to be secured by mortgage. Burgett v. Osborne, 172 Ill. 227; Batcheller v. Batcheller, 144 Ill. 471; and in Heaton v. Gaines, 198 Ill. 479, the court states the rule to be that in order to establish the fact that a deed absolute upon its face is a mortgage "it must appear that a debt exists,





due from the person claimed to be mortgagor to the person claimed to be mortgagee." In the absence of any debt there can be no mortgage. A large number of decided cases support this. It might also be said that there was nothing substantial which complainants had at the date of the conveyance by quit claim which could be the subject of a mortgage; all right or interest of complainants in the premises was on the verge of expiring, which negatives completely the suggestion that any one would accept their interest as security for a loan.

Carpenter v. Plagge, 192 Ill. 82, is in point, where the court said:

"When the instrument of October 8, 1878, was executed, the twelve months, allowed by law to the appellants and to the other heirs of Daniel F. Carpenter, deceased, to redeem the forty acres from the foreclosure sale, had expired, or were about to expire. Upon the expiration of the statutory period of twelve months appellants had no interest in the property. During the three months after the expiration of the twelve months only judgment creditors could redeem. Inasmuch, therefore, as appellants had no interest in the property by reason of the expiration of the twelve months, there was no title in them which they could mortgage."

See, also, Burgett v. Osborne, supra, and Conkey v. Rex, 212 Ill. 444.

A further consideration is that the conduct of the parties after the period of redemption had expired in January, 1902, cannot be reconciled with the theory that complainants retained any equitable interest in the property. Defendants went immediately into possession of the land, paid all the taxes, and held themselves out to be the owners, and nine years thereafter made a sale, all of which was fully known to the complainants, who never questioned the acts of defendants until three years after the sale had been made. No claim was made during all of this time as to the existence of a mortgage or that the quit claim deed was anything else than an absolute conveyance.





In 27 Cyc. 971, it is said that "after the expiration of the time during which the grantor had a right to repurchase, he allows the grantee to sell the property to a stranger, and sees the latter enter and improve, without any claim of a right to redeem on his part, this will be evidence that he considered the original transaction as a sale and not a mortgage." Supporting this is Hart v. Randolph, 142 Ill. 521.

Finally, it may be said that complainants have been guilty of laches so as to bar the relief they seek. As noted above, the character of the transaction between the parties was not questioned until over fourteen years thereafter. What is said in McDearmon v. Burnham, 158 Ill. 55, is peculiarly applicable to the present case:

"When a court of equity is asked to lend its aid in the enforcement of a demand that has become stale, there must be some cogent and weighty reasons presented why it has been permitted to become so. Good faith, conscience and reasonable diligence of the party seeking its relief are the elements which call a court of equity into activity. In the absence of these elements the court remains passive, and declines to extend its relief or aid. It has always been the policy to discountenance laches and neglect."

This is quoted with approval in Fitch v. Miller, 200 Ill. 170, and in Moore v. Taylor, 251 Ill. 468, the court said: "Equity does not encourage stale claims, since by lapse of time there must, of necessity, be great difficulty in ascertaining the exact facts as to the matter in controversy. Unreasonable delay has been held to be a bar to equitable relief, even against a trustee."

We have not noted in this opinion many of the items of testimony, nor attempted to state what took place at all of the interviews between the parties, consideration of which has not altered our conclusion that upon the whole record there is no equity with the complainants and that the chancellor



was right in ordering that the bill be dismissed.

For the reasons above indicated the decree dismissing the bill for want of equity is affirmed.

AFFIRMED.



and also in respect to the gift of the land.

The first witness named the owner of

the land as being the gift of the land.

The second witness named the owner of

the land as being the gift of the land.

The third witness named the owner of

the land as being the gift of the land.

The fourth witness named the owner of

the land as being the gift of the land.

The fifth witness named the owner of

the land as being the gift of the land.

The sixth witness named the owner of

the land as being the gift of the land.

The seventh witness named the owner of

the land as being the gift of the land.

The eighth witness named the owner of

the land as being the gift of the land.

The ninth witness named the owner of

the land as being the gift of the land.

The tenth witness named the owner of

the land as being the gift of the land.

The eleventh witness named the owner of

the land as being the gift of the land.

The twelfth witness named the owner of

the land as being the gift of the land.

The thirteenth witness named the owner of

the land as being the gift of the land.

The fourteenth witness named the owner of

the land as being the gift of the land.

The fifteenth witness named the owner of

the land as being the gift of the land.

MAX ZAMBAR,

Appellee,

vs.

THE PEOPLES GAS LIGHT AND  
COKE COMPANY, a corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

204 I.A. 290

MR. PRESIDING JUSTICE MCGURRY

DELIVERED THE OPINION OF THE COURT.

Plaintiff, while on North avenue, in Chicago, was struck and injured by an automobile truck. He brought suit for damages, and upon trial by a jury had judgment for \$5,000 from which defendant has appealed.

By appropriate pleas the ownership of the automobile truck was put in issue, and most of the testimony in the case touches this question. The testimony of plaintiff tending to show that the defendant owned the truck was, to say the least, rather frail, depending almost exclusively upon the story of two witnesses. Defendant placed upon the stand a considerable number of witnesses, many of them its employees, who gave evidence which if true tended strongly to prove defendant's claim of non-ownership. It was an exceedingly close case, so that the necessity of accurate instructions was imperative. At the request of plaintiff the court gave the following instruction:

"The court instructs the jury that in considering the credibility of the witnesses and in determining the weight of their testimony, that they may take into consideration the fact that the witness is either in the employ of the defendant or of the plaintiff, and also his connection, if any, with the act causing the injury complained of and take such testimony in connection with all the other evidence in this case, the same as they receive the testimony of any other witness, and determine the credibility of such employee by the same principles and tests by which they determine the credibility of any other witness."

THE PEOPLE

vs.

THE PEOPLE HAS RIGHT AND  
DOES NOT WANT A CORPORATION  
APPEARED.

205-12307

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF FLORIDA

IN RE: THE ESTATE OF J. M. BROWN

Plaintiff, while on North Avenue, in Chicago,  
was struck and injured by an automobile truck. He brought  
suit for damages, and upon trial by a jury and judgment  
for \$5,000 from which defendant has appealed.

By appropriate plead the ownership of the au-  
tomobile truck was put in issue, and most of the testimony  
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in the employ of the defendant or of the plaintiff, and  
also his nonconnected. It may, with the aid of the  
jury, be considered of and take such testimony is conso-  
tious with all the other evidence in this case, and  
as that evidence the testimony of any other witness, and  
ascertain the credibility of such evidence by the same  
principles and rules by which they determine the credi-



Under the circumstances of this case this instruction should not have been given for the reason that it divides the witnesses into two classes, those who were employees and those who were not. As the Supreme Court stated in Chicago Street Ry. Co. v. Rollins, 195 Ill. 219, this classification was uncalled for and in view of the facts should not have been made. "No employee of an individual litigant testified in the case, and it was improper for the court to put those of the defendant on the same footing with that class of employees." Among other decided cases in which such an instruction has been condemned are Bennett v. Chicago City Ry. Co., 243 Ill. 420; Roberts v. Chicago City Ry. Co., 262 Ill. 228; Dowd v. Chicago City Ry. Co., 153 Ill. App. 85, and Ovens v. Chicago City Ry. Co., 171 Ill. App. 647.

In view of the absence of any evidence that any of the witnesses, save plaintiff, had any personal connection with the accident itself, it was improper to suggest that there was such connection by using in the instruction the words, "and also his connection, if any, with the act causing the injury complained of."

At the request of plaintiff the court also gave that familiar instruction with which attorneys so frequently risk a reversal, which is as follows:

"The court instructs the jury that the fact, if it is a fact, that the number of witnesses testifying in this case on one side is larger than the number who testified on the other side, does not necessarily alone determine that the preponderance of evidence is on the side on which the larger number testified. In order to determine that question, the conduct of the witnesses while testifying, their apparent intelligence or the lack of it, their opportunity for knowing or seeing the facts or circumstances concerning which they have testified, or the absence of such opportunity, as shown by the evidence, their interest or the absence of interest in the result of the case, as shown by the evidence, and from all these facts, and from all the other facts and circumstances shown by the evidence, the jury must determine on which side is the preponderance."



[illegible]

In this case the number of witnesses testifying on one side was an important matter to be considered by the jury in determining where was the preponderance of evidence. It was reversible error to smother this important factor by the negative words used in the first part of the instruction and by omitting it entirely from the affirmative statement of the elements necessary to be considered. See Elgin, J. & E. Ry. Co. v. Lawler, 229 Ill. 621; Lyons v. Ryerson & Son, 242 Ill. 409; Lyons v. Chicago City Ry. Co., 258 Ill. 75.

Complaint is made by the defendant of the refusal of the court to give the instruction tendered by it to the effect that it must be shown that the car was operated by defendant's servants acting within the scope of their authority. In view of the theory of the defendant that it did not own the car causing the accident it was not reversible error to refuse this.

The two medical witnesses, Doctors Wolf and Handmacher, testified that they had examined the plaintiff, not for the purpose of treatment but for the purpose of qualifying for giving testimony. They were permitted to give an opinion based upon information given to them concerning the history of the case, and partly upon subjective symptoms in addition to objective symptoms. The admission of such testimony constituted prejudicial error, as has been held repeatedly. Among many cases so holding are Grienke v. Chicago City Ry. Co., 234 Ill. 564; Fuhry v. Chicago City Ry. Co., 239 Ill. 548; Shaughnessy v. Molt, 236 Ill. 485; Chicago Union Traction Co. v. Giese, 229 Ill. 260.

For the errors above indicated the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.





275 - 22709

THE SHERARDIZING COMPANY OF  
ILLINOIS, a corporation,  
Appellant,

vs.

THE FEDERAL SIGN SYSTEM,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 297

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to have reversed a judgment entered against it on the defendant's claim of set-off.

Plaintiff performed for defendant the process of "sherardizing" certain metal rings, delivered by defendant to plaintiff for that purpose. "Sherardizing" seems to be a process for covering metal with a zinc powder by the aid of heat. It brought suit to recover for these services, and in its statement of claim set forth an item under date of November 6, 1915, of \$35.22, and another under date of November 10, 1915, of \$7.26. By its affidavit of defense defendant admitted the correctness of the item of November 6th, but claims that the rings delivered for sherardizing on November 10th were completely spoiled and made useless, to the loss of defendant of \$92.80. On trial by the court there was a finding favorable to defendant's claim of set-off, and damages were assessed at \$57.68 against the plaintiff and judgment entered thereon.

From the evidence the court could properly find that 20,000 rings were sent by the defendant to the plaintiff to be sherardized, but that through improper work the rings were spoiled so as to be rendered useless. The



THE SHERRILL COMPANY OF  
ILLINOIS, a corporation,  
Appellant,

vs.

THE FEDERAL SIGN SYSTEM,  
Appellee.

OF CHICAGO.

MR. PRESIDENT JUSTICE ROBERTS  
DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to have reversed a judgment entered against it on the defendant's claim of set-off.

Plaintiff performed for defendant the process of "sherrellizing" certain metal rings, delivered by defendant to plaintiff for that purpose. "Sherrellizing" seems to be a process for covering metal with a zinc powder by the aid of heat. It brought suit to recover for these services, and its statement of claim set forth an item under date of November 8, 1915, of \$25.22, and another under date of November 10, 1915, of \$7.86. By its affidavit of defense defendant admitted the correctness of the item of November 8th, but claims that the rings delivered for sherrellizing on November 10th were completely spoiled and made useless, to the loss of defendant of \$27.86. On trial by the court there was a finding favorable to defendant's claim of set-off, and damages were assessed at \$27.86 against the plaintiff and judgment entered thereon.

From the evidence the court could properly find that 20,000 rings were sent by the defendant to the plaintiff to be sherrellized, and that through improper work the rings were spoiled so as to be rendered useless. The

court could also properly find that the value of these rings was \$4.64 per thousand. It would follow from these facts that plaintiff was liable for the loss of these rings and defendant was properly entitled to damages. We think there is sufficient proof in the record of the amount of damages; the evidence is undisputed as to their value before they were sent to the plaintiff, and that when returned they were wholly useless.

The judgment is right and is affirmed.

**AFFIRMED.**

account would also properly find that the value of these rings was \$4.00 per piece. It would follow from these facts that plaintiff was liable for the loss of these rings and defendant was properly entitled to damages. We think there is sufficient proof in the record of the amount of damages; the evidence is undisputed as to their value before they were sent to the plaintiff, and that when returned they were wholly useless.

The judgment is right and is affirmed.

APPROVED.

THE J. W. HOODWIN COMPANY,  
a corporation,

Appellee,

vs.

A. E. FINKERTON, R. R. FINKER-  
TON and J. W. RANKIN

On appeal of A. E. FINKERTON  
and R. R. FINKERTON,  
Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

204 I.A. 298

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$50 against the defendants, upon trial by the court in an action of tort. Suit was originally brought against Matt W. Pinkerton and the other defendants, but Matt W. Pinkerton having died pendente lite the suit was discontinued as to him.

Plaintiff claims that in February, 1914, it was induced to pay the sum of \$50 to Henry E. Failer, an agent of the defendants, who were doing business under the name of Pinkerton & Co., U. S. Detective Agency, upon a representation by Failer that this was the same company as the Pinkerton National Detective Agency, with its office on 5th avenue, Chicago. The defense presented by the defendants A.E. Pinkerton and R. R. Pinkerton, who are appealing here, is that they were not connected in any manner with the Pinkerton & Co., U. S. Detective Agency which received plaintiff's money.

While the evidence tends to show that plaintiff was induced to pay the money involved upon the representation that he was dealing with the older company, called the Pinkerton National Detective Agency, yet we cannot say that the evidence



THE U. S. NATIONAL BANK  
a corporation,  
Appellee,

vs.

A. S. LINCOLN, A. S. FINKER-  
TON and J. W. MARSH

ON appeal of A. S. LINCOLN  
and A. S. FINKERTON,  
Appellants.

COURT OF CHICAGO.

204 I. A. 238

THE FOLLOWING JUSTICE RESPECTFULLY  
RECOMMENDS THE GRANT OF THE COURT.

This is an appeal from a judgment for the defendant, upon trial by the court in an action of tort. The defendant, upon trial by the court in an action of tort, was originally present and last A. S. Finkerton and the other defendants, but last A. S. Finkerton having filed petitions for the writ was discontinued as to him.

Defendant claims that in February, 1914, it was

induced to pay the sum of \$50 to Harry H. Heller, an agent of the defendant, who were doing business under the name of Finkerton & Co., U. S. Detective Agency, upon a representation by Heller that this was the same company as the Finkerton National Detective Agency, with its office on 324 West 11th, Chicago. The defense presented by the defendant A. S. Finkerton and A. S. Finkerton, who are appearing here, is that they were not connected in any manner with the Finkerton & Co., U. S. Detective Agency which received plaintiff's money.

While the evidence goes to show that plaintiff was induced to pay the money levied upon the representation that he was dealing with the Finkerton & Co., U. S. Detective Agency, yet he cannot say that the witness

shows that the defendant A. E. Pinkerton, whose full name is Anna E. Pinkerton and who is the widow of Matt W. Pinkerton, or the defendant R. R. Pinkerton, whose full name is Ralph R. Pinkerton, had any interest whatever, either as partners or otherwise, in the Pinkerton & Co., U. S. Detective Agency. There was introduced a letter from this latter company, and on the letterhead appeared - "A. E. Pinkerton, Assistant General Manager" and "R. R. Pinkerton, Assistant General Manager"; but Mrs. Pinkerton is positive in her denial that her name appeared there with her consent. There was also introduced a bill which was in the custody of the clerk of the United States District Court as part of the files in a suit, in which bill it was stated that A. E. Pinkerton and R. R. Pinkerton are part owners of an interest in the business of this agency, but the bill was not signed by either A. E. Pinkerton or R. R. Pinkerton, and the evidence shows that they had no knowledge whatever of such a proceeding.

It is a fair inference from the record that Matt W. Pinkerton in his lifetime, for purposes he thought advantageous to him, used on his letterheads and advertisements the names of his wife and minor son without their knowledge or consent.

We hold that plaintiff has failed to prove any connection of these defendants who appeal with the detective agency in question, and that rather the greater weight of the evidence tends to prove that there was no connection.

The appellee has not appeared in this court.

At the conclusion of the case counsel for defendants A. E. Pinkerton and R. R. Pinkerton moved the court to find them not guilty, which motion was denied. In so

shows that the defendant A. E. Pinkerton, whose full name is  
A. E. Pinkerton and who is the widow of Matt W. Pinkerton,  
or the defendant M. W. Pinkerton, whose full name is Matt  
W. Pinkerton, had any interest whatever, either as partner  
or otherwise, in the Pinkerton & Co., U. S. Detective Agency.  
There was introduced a letter from this latter company, and  
on the letterhead appeared - "A. E. Pinkerton, Assistant General  
Manager" and "M. W. Pinkerton, Assistant General  
Manager"; but Mr. Pinkerton is positive in his denial that  
her name appeared there with her consent. There was also  
introduced a bill which was in the custody of the clerk of  
the United States District Court as part of the files in a  
suit, in which bill it was stated that A. E. Pinkerton and  
M. W. Pinkerton are part owners of an interest in the busi-  
ness of this agency, but the bill was not signed by either  
A. E. Pinkerton or M. W. Pinkerton, and the evidence shows  
that they had no knowledge whatever of such a proceeding.  
It is a fair inference from the record that Matt  
W. Pinkerton in his lifetime, for purposes he thought advan-  
tageous to him, used on his letterheads and advertisements  
the names of his wife and minor son without their knowledge  
or consent.  
We hold that plaintiff has failed to prove any  
connection of these defendants who appear with the detective  
agency in question, and that rather the greater weight of  
the evidence tends to prove that there was no connection.  
The appellee has not appeared in this court.  
As the conclusion of the case cannot be de-  
termined A. E. Pinkerton and M. W. Pinkerton moved the court  
to find them not guilty, which motion was denied. In so

ruling the trial court was in error; the motion should have been allowed.

The judgment is reversed and the cause remanded. .

REVERSED AND REMANDED.



joining the trial court was in error; the motion should be

been allowed.

The judgment is reversed and the case remanded.

REVEREND AND HONORABLE

JOHN F. CAMPBELL COMPANY,  
a corporation,

Appellee,

va.

LAWRENCE ICE CREAM COMPANY,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 299

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from the defendant the agreed price of 200 barrels of sugar which had been sold and delivered to the defendant. Upon trial by the court judgment was had by the plaintiff for \$1,502.77.

From the evidence the court could properly find that the plaintiff is a dealer and broker in sugars, in Chicago, and that the defendant is engaged in the manufacture of ice cream in the same city, that about a year before the time of the transaction in question plaintiff had made a sale to the defendant, and other sales at earlier dates. John E. Bunker was vice-president of the plaintiff company, devoting himself principally to the sales department. He had called at the place of business of the defendant many times with a view to procuring orders for sugar, at which times he had had conversations with Joseph A. Rosenberg, who was the buyer for defendant and also president of the defendant company. On August 18, 1914, someone from the defendant gave an order over the phone to the president of the plaintiff for 200 barrels of sugar at a specified price.

The whole controversy centers around this telephone

JOHN F. CAMERON COMPANY,  
a corporation,  
Appellee,

vs.

LAWRENCE ICE CREAM COMPANY,  
a corporation,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 233

MR. PRESIDING JUDGE HOLBURN  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from the defendant the agreed price of 200 barrels of sugar which had been sold and delivered to the defendant. Upon trial by the court judgment was had by the plaintiff for \$1,000.00. From the evidence the court could properly find that the plaintiff is a dealer and broker in sugar, in Chicago, and that the defendant is engaged in the manufacture of ice cream in the same city, that about a year before the time of the transaction in question plaintiff had made a sale to the defendant, and other sales at earlier dates. John E. Hunter was vice-president of the plaintiff company, defendant himself principally to the sales department. He had called at the place of business of the defendant many times with a view to securing orders for sugar, at which times he had had conversations with Joseph A. Roseberry, who was the buyer for defendant and also president of the defendant company. On August 13, 1914, sometime from the defendant gave an order over the phone to the president of the plaintiff for 200 barrels of sugar at a specified price.

The whole controversy centers around this telephone

conversation. Mr. Rosenberg, the defendant's president, testified that he gave the order, but that it was an order for himself and not for the defendant, the Lawrence Ice Cream Company. It is not necessary to note the details. The court was abundantly justified in finding that the order was not for Mr. Rosenberg personally but was for the defendant company, for which he was the buyer and of which he was also president. There was no doubt or uncertainty in the contract, and defendant was clearly liable for its failure to perform its conditions of payment at the price agreed upon.

There is no reason to reverse, and the judgment is affirmed.

AFFIRMED.



conversation. Mr. Rosenberg, the defendant's president, testified that he gave the order, but that it was an order for himself and not for the defendant, the latter being a firm company. It is not necessary to note the order. The order was abundantly justified in finding that the order was not for Mr. Rosenberg personally but was for the defendant company, for which he was the buyer and of which he was also president. There was no doubt or uncertainty in the contract, and defendant was clearly liable for its failure to perform the condition of payment at the price agreed upon.

There is no reason to reverse, and the judgment

is affirmed.

ATTORNEY.

E. F. HEYWOOD, Jr., for use of  
GREENVILLE STONE & GRAVEL COM-  
PANY, a corporation,

Appellee,

vs.

OLD COLONY TRUST & SAVINGS BANK,  
a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 300

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed  
a judgment against it of \$1,632.53.

By plaintiff's statement of claim it is averred  
that on June 11, 1914, E. F. Heywood, Jr., deposited to his  
own credit with the defendant by check the sum of \$1,500;  
that on June 17th he drew his check on the defendant for  
\$1,498.50 to the order of F. W. Katterjohn, president of  
the Greenville Stone & Gravel Company, for whose use this  
suit is brought; that on the same day Katterjohn presented  
this check to the defendant, but payment was refused; that  
prior to drawing said check Heywood had not withdrawn or  
assigned said amount or any portion thereof.

The defense asserted is that the money deposited  
by Heywood in fact belonged to a company of which he was sec-  
retary, called the Marsh Company; that this company, on the  
date of the deposit by Heywood, owed defendant \$3,667.60 as  
a balance due for money loaned it by defendant; that after  
receiving the deposit from Heywood for his account the de-  
fendant credited the amount of this check upon the indebted-  
ness of the Marsh Company and charged the same against the  
deposit account of Heywood, thus extinguishing his deposit

To the Honorable, the Justices of the Supreme Court of the State of New York, in and for the County of New York.  
 The undersigned, the Old Colony Trust & Savings Bank, a corporation,  
 do hereby certify that the within and foregoing is a true and correct copy of the original of the same, as the same appears from the records of the said corporation.  
 Witness my hand and seal this 10th day of March, 1901.  
 Attest:  
 J. M. HAYES, President of the Old Colony Trust & Savings Bank.  
 J. M. HAYES, Secretary of the Old Colony Trust & Savings Bank.

OF CHARGE.

003.1.1.03

RECEIVED THE OPINION OF THE COURT.

ly this appeal defendant seeks to have reversed.

My plaintiff's statement of claim it is averred that on June 11, 1914, E. F. Heywood, Jr., deposited to his own credit with the defendant by check the sum of \$1,300; that on June 17th he drew his check on the defendant for \$1,408.50 to the order of E. W. Katterjohn, president of the Greenville Stone & Gravel Company, for whose use this suit is brought; that on the same day Katterjohn presented this check to the defendant, but payment was refused; that prior to drawing said check Heywood had not withdrawn or assigned said amount or any portion thereof.

The defense asserted is that the money deposited by Heywood in fact belonged to a company of which he was secretary, called the Hersh Company; that this company, on the date of the deposit by Heywood, owed defendant \$5,637.30 as a balance due for money loaned it by defendant; that after receiving the deposit from Heywood for his account the defendant credited the amount of this check upon the indebtedness of the Hersh Company and charged the same against the deposit account of Heywood, thus extinguishing his deposit.



account, so that when six days later Katterjohn presented the check drawn by Heywood there were no funds in this account with which to pay the check. Defendant claimed a right of set-off for the full amount of plaintiff's claim.

To this plaintiff asserted by affidavit that the Marsh Company had no ownership or interest in the Heywood check or the funds represented thereby; that the equitable interest therein was in the Greenville Stone & Gravel Company, and that Heywood held the same in trust for it; that Heywood at no time acted as agent for the Marsh Company in making deposits of the Marsh Company to the credit of Heywood in the defendant's bank. It is admitted that the defendant applied the proceeds of the check in extinguishment of the debt of the Marsh Company, but it is averred that said application was wrongful and without authority.

The case was tried by the court without a jury, and upon its conclusion the court found the issues for the plaintiff and entered judgment for the original sum of \$1,498.50, the amount of the check, with interest thereon at 5% from June 17, 1914, to the date of the entry of judgment.

We are of the opinion that the court properly could find from the evidence that on or about June 9, 1914, the beneficial plaintiff, Greenville Stone & Gravel Company, through its president, F. W. Katterjohn, was negotiating for the purchase of two boilers from the Village of Forest Park with the Marsh Company, who were commission brokers in the purchase and sale of contractors' machinery and equipment. Heywood was secretary of the Marsh Company, with whom Mr. Katterjohn was conducting the deal. They went to Forest Park and had the boilers inspected, and closed arrangements



account, so that when six days later another check was drawn by Heywood there were no funds in the account with which to pay the check. Defendant claimed a right of set-off for the full amount of Plaintiff's claim. To this Plaintiff asserted by affidavit that

the Marsh Company had no ownership or interest in the Heywood check or the funds represented thereby; that the equitable interest therein was in the Greenville Stone & Gravel Company, and that Heywood held the same in trust for it; that Heywood at no time acted as agent for the Marsh Company in making deposits of the Marsh Company to the credit of Heywood in the defendant's bank. It is admitted that the defendant applied the proceeds of the check in extinguishment of the debt of the Marsh Company, but it is averred that said application was wrongful and without authority.

The case was tried by the court without a jury, and upon its conclusion the court found the issues for the plaintiff and entered judgment for the original sum of \$1,498.80, the amount of the check, with interest thereon at 5% from June 17, 1914, to the date of the entry of judgment.

We are of the opinion that the court properly could find from the evidence that on or about June 4, 1914, the defendant Plaintiff, Greenville Stone & Gravel Company, through its president, T. W. Katterjohn, was negotiating for the purchase of two bolters from the Village of Forest Park with the Marsh Company, who were commission brokers in the purchase and sale of contractors' machinery and equipment. Heywood was secretary of the Marsh Company, with whom Mr. Katterjohn was conducting the deal. They went to Forest Park and had the bolters inspected, and closed transactions

for the purchase with a representative of the village. For its commission for negotiating this deal the Marsh Company was to receive \$500, and \$1500 less the cost of dismantling and loading the boilers was to be paid to the Village of Forest Park. Mr. Katterjohn proposed to pay the representative of the village by a check, but was informed by the representative that the payment to the village must be in cash. Mr. Katterjohn did not have the currency with him, and was leaving Chicago that evening to return to his home in Kentucky. It was suggested, and followed, that Katterjohn should draw two checks, one for \$500 and the other for \$1500, the former being for Marsh Company's commission, and the \$1500 was to be used by Mr. Heywood for the purpose of paying the village for the boilers and loading them on the cars. Both checks were made payable to the Marsh Company, but it was agreed with reference to the \$1500 check that it should be cashed by Heywood and used by him in consummating the deal with the village. After endorsement by the Marsh Company, the \$1500 check was deposited in the defendant bank to the personal account of Heywood. Mr. Katterjohn had left for Kentucky, leaving the matter in Heywood's hands. The proceeds of the check were received by the bank, and it then notified both Heywood and the Marsh Company that it had used the credit and applied the same on the Marsh Company's account, the cashier informing Mr. Marsh of the Marsh Company that "we found the money in here and we decided we would grab it." Heywood thereupon notified Mr. Katterjohn and drew a check to his order for the sum of \$1,498.50, which on June 17, 1914, was presented by Katterjohn to the bank and payment refused.

From these facts the conclusion is inevitable that the Marsh Company at no time had any interest, equitable

for the purpose with a representative of the village. The  
 its conclusion for negotiating this deal the bank company  
 was to receive \$500, and \$1500 less the cost of transporting  
 and loading the bolera was to be paid to the village.  
 Forest Bank. Mr. Katterjohn proposed to pay the representa-  
 tive of the village by a check, but was informed by the  
 representative that the payment to the village must be in  
 cash. Mr. Katterjohn did not have the currency with him,  
 and was leaving Chicago that evening to return to his  
 home in Kentucky. It was suggested, and followed, that  
 Katterjohn should draw two checks, one for \$500 and the  
 other for \$1500, the former being for Marsh Company's  
 account, and the \$1500 was to be used by Mr. Heywood for  
 the purpose of paying the village for the bolera and load-  
 ing there on the cars. Both checks were made payable to the  
 Marsh Company, but it was agreed with reference to the  
 \$1500 check that it should be cashed by Heywood and used by  
 him in consummating the deal with the village. After an-  
 agreement by the Marsh Company, the \$1500 check was deposited  
 in the defendant bank to the personal account of Heywood.  
 Mr. Katterjohn had left for Kentucky, leaving the matter in  
 Heywood's hands. The proceeds of the check were received  
 by the bank, and it then notified both Heywood and the Marsh  
 Company that it had used the credit and applied the same on  
 the Marsh Company's account, the cashier informing Mr. Marsh  
 of the Marsh Company that "we found the money in here and we  
 decided we would cash it." Heywood thereupon notified Mr.  
 Katterjohn and drew a check to his order for the sum of  
 \$1,475.00, which on June 17, 1914, was presented by Katter-  
 john to the bank and payment refused.  
 From these facts the conclusion is inevitable  
 that the Marsh Company at no time had any interest, participa-



or otherwise, in the fund received from Katterjohn and deposited in Heywood's account. This money equitably belonged to the Greenville Stone & Gravel Company, and was held by Heywood in trust to be used for the specific purpose of making the necessary cash payment to the Village of Forest Park for the boilers. There was an offer to show that Mr. Katterjohn afterwards went to the village and purchased the boilers directly from it, paying for them in cash. We think the trial court should have admitted this testimony, as it tends to show that the title to the boilers never left the Village of Forest Park. However, we think the evidence which was admitted ample to show that the title to the boilers continued in the village and that Marsh Company never had any interest in them.

The legal title to the deposit was in E. F. Heywood, Jr.; the equitable title being in the Greenville Stone & Gravel Company, the bank was wholly wrong in attempting to apply the fund upon the account of a third party. See <sup>Sec. 140;</sup> Zane on Banks & Banking/ Falkland v. St. Nicholas Nat'l Bank, 84 N. Y. 145.

Our conclusion on the facts and as to the relations of the parties disposes of all points made by counsel for the defendant.

We hold that plaintiff was properly entitled to interest, either upon the theory that there was an unreasonable and vexatious delay in withholding payment, or on the theory that interest will be allowed on money received to the use of another. See Marsh v. First State Bank & Trust Co., 185 Ill. App. 29; Rosenbaum Bros. & Co. v. Drumm Com. Co., 176 Ill. App. 205; Brennan v. Gallagher, 199 Ill. 207.

We are of the opinion that the judgment is right, and it is affirmed.

**AFFIRMED.**



at Greenville, in the town of ...  
... in ...  
... to the Greenville ...  
... to be used for the ...  
... of ...  
... for the ...  
... to the village and ...  
... for ...  
... should have ...  
... the title to the ...  
... of Forest Park. However, ...  
... to show that ...  
... in the village and ...  
... and any interest in them.

The legal title to the ...  
... in the Greenville ...  
... the bank was ...  
... of a third party. ...  
Sec. 140;  
... v. ...  
... 143.

In conclusion ...  
... of the parties ...  
... for the ...

It is ...  
... interest, ...  
... or ...  
... interest will be ...  
... v. ...  
... v. ...  
... v. ...

It is ...  
... is ...

JAMES CROISDALE,  
Appellee,

vs.

D. M. FARSON,  
Appellant.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

204 I.A. 302

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit against defendant upon endorsements on certain stock certificates, had judgment for \$3,900, from which defendant appeals.

The facts giving rise to the controversy are, that the Pocatello Electric Light & Power Company, an Illinois corporation, on November 16, 1903, issued its certificate to plaintiff for 240 shares of \$100 each of its capital stock. There was endorsed on the back of this certificate when it was sold and delivered to plaintiff the following:

"A dividend of five per cent. on the within stock has been guaranteed by the American Falls Power Light and Water Co., of Idaho.

R. D. MANSON, Pr.

"I hereby guarantee the payment of the above dividend during the life of James Croisdale.

D. M. FARSON."

The suit is brought upon this guarantee of Farson, the defendant, who contends that this contract is for the payment of one dividend only of five per cent. on the stock, and no more, and that this has already been paid.

From the documents and testimony in evidence it is clearly proven that this was not the construction placed by the parties upon the contract, even if it should be conceded that there is any ambiguity therein. The parties acted upon this as an obligation on the part of Farson to pay a



dividend of five per cent. annually to the holder of the certificate during the lifetime of James Croisdale. It was also shown that this annual dividend was payable semi-annually, on the first day of February and on the first day of August, and that it was paid for a period of about eight years.

The parties having put their own construction on this obligation, defendant cannot now be heard to contend that the obligation was discharged by the payment merely of one dividend; all his letters indicate to the contrary. These letters of defendant sufficiently prove the allegations of the declaration with regard to the non-payment to plaintiff of the dividends claimed.

We think there was no error in the amount of the judgment. The plaintiff claimed the dividends for three years, the first of which was due February 1, 1912, the next February 1, 1913, and the next February 1, 1914. This would make \$3,600, and adding interest on these installments at the rate of five per cent. would make the judgment properly for a larger sum than was entered.

There was no error upon the trial, and the judgment is affirmed.

AFFIRMED.





MARTIN LAVIN, Administrator of  
the Estate of THOMAS LAVIN,  
Deceased,

Appellee,

vs.

WELLS BROTHERS COMPANY,

Appellant.

2647  
APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

204 I.A. 303

MR. JUSTICE DEWTER DELIVERED THE OPINION OF THE COURT.

On a petition filed by Martin Lavin, administrator of the estate of Thomas Lavin, deceased, under the Workmen's Compensation Act of 1911, arbitrators were appointed who met and heard evidence, and under the act entered an award in favor of the petitioner. From this award the respondent, Wells Brothers Company, appealed to the Superior Court of Cook County, where the cause was retried by the court without a jury and a finding was entered in favor of the petitioner and against the respondent in the sum of \$3,500, payable in weekly installments of \$8.61. Judgment was entered on this finding, and the respondent has brought the case to this court by appeal for review.

The evidence taken on the trial discloses that Thomas Lavin, deceased, on Sunday, January 12, 1913, was employed by respondent as a laborer in a large building which was in course of construction by the respondent as contractor for Butler Brothers. Deceased on the above date was working on the first floor of the building, carrying boards which were being used to build a shanty around a motor. He was last seen alive walking along the first floor of the building carrying planks, and he appeared to be looking for other planks. Ten or fifteen minutes later he was discovered lying in the basement of the building suffering from injuries from which he died four days later.

2011.1.30

IN JUDICIAL DEPARTMENT THE OFFICE OF THE COURT.

On a petition filed by Martin Lavin, administrator of the estate of Thomas Lavin, deceased, under the Lavin's Compensation Act of 1911, administrators were appointed who met and heard evidence, and under the act entered an award in favor of the petitioner. From this award the respondent, Wells Brothers Company, appealed to the Superior Court of Cook County, where the case was retried by the court without a jury and a finding was entered in favor of the petitioner and against the respondent in the sum of \$3,500, payable in weekly installments of \$8.00. Judgment was entered on this finding, and the respondent has brought the case to this court by appeal for review. The evidence taken on the trial included that Thomas Lavin, deceased, on January 12, 1915, was employed by respondent as a laborer in a large building which was in course of construction by the respondent as contractor for Fuller Brothers. Deceased on the above date was working on the first floor of the building, and in some work were being used to build a second story motor. He was last seen alive walking along the first floor of the building carrying a plank, and he appeared to be looking for other planks. Ten or fifteen minutes later he was discovered lying in the basement of the building, and a few minutes later he was found dead.

WELLS BROTHERS COMPANY,  
Appellant.

vs.

MARTIN LAVIN, Administrator of the Estate of THOMAS LAVIN, Deceased,  
Appellee.

ALLIED SHIP BUILDING CO.,  
COOK COUNTY.



The evidence tends to disclose that there were several unguarded holes or openings in the floor upon which deceased was working a short time before he was found in the basement.

A surgeon, testifying for respondent, stated that he examined deceased after he was removed to the hospital; that deceased had a fracture of the nose, at the junction of the frontal bone and the nasal bone near the sinuses, and a small fracture of the lower jaw on the right side, and some laceration of the chin and forehead.

It is urged by counsel for respondent that the evidence does not tend to prove that the injuries which deceased sustained and which caused his death arose out of his employment. We do not believe there is great merit in this contention. So far as the evidence discloses, the deceased just before the time he sustained the injuries was in the performance of his regular work for his employer. While it is not shown that any person saw the accident which resulted in the injuries causing death, it is fairly inferable from the evidence that such injuries were received by deceased as the result of a fall through one of several unguarded holes which existed in the first floor of the building in question. There were other employees working in and about the building at the time, yet no witness testified to any facts from which it might reasonably be concluded that the injuries sustained by deceased were inflicted in any other manner - as suggested by counsel for respondent. At an inquest held to inquire into the manner of deceased's death a coroner's jury returned a verdict in which they found, among other things, that deceased came to his death as the result of injuries received "when deceased fell, evidently from the first floor to the basement, while carrying or gathering boards to build a shanty in the Butler Building."



The evidence tends to disclose that there were several untraced hairs or fragments in the floor upon which deceased was sitting a short time before he was found in the basement.

A surgeon, testifying for respondent, stated that he examined deceased after he was removed to the hospital; that deceased had a fracture of the nose, at the junction of the frontal bone and the nasal bone near the sinuses, and a small fracture of the lower jaw on the right side, and some laceration of the skin and tissues.

It is urged by counsel for respondent that the evidence does not tend to prove that the injuries which deceased sustained and which caused his death arose out of his employment. We do not believe there is great merit in this contention. So far as the evidence indicates, deceased just before the time he sustained the injuries was in the performance of his regular work for his employer. While it is not shown that any person was the

accident which resulted in the injuries causing death, it is fairly inferable from the evidence that such injuries were received by deceased as the result of a fall through one of several untraced holes which existed in the first floor of the building in question. There were other employees working in and about the building at the time, yet no witness testified to any facts from which it might reasonably be concluded that the injuries sustained by deceased were inflicted in any other manner - he suggested

by counsel for respondent. At an incident held to determine the manner of deceased's death a coroner's jury returned a verdict of which some found, among other things, that deceased came to his death as the result of injuries received "when descended full, evidently from the first

floor to the basement, while engaged in repairing work to build a shaft in the first building."

In Victor Chemical Works v. Industrial Board,

274 Ill. 11, it was held that where there was competent legal evidence to support a decision of the Industrial Board, it is not within the province of the courts to pass upon its sufficiency. We believe that the evidence taken on the trial in the case at bar fairly tends to show that the injuries and death of deceased arose out of his employment for respondent.

Deceased had for some time prior to his death contributed to some extent to the support of his parents who resided in Ireland. They were non-resident aliens, and it is urged that inasmuch as the evidence does not disclose that such parents were dependent upon deceased for support, there can be, under the act, no legal award in their favor. Paragraph A of section 4 of the act provides -

"If the employee leaves any widow, child or children or parents or other lineal heirs to whose support he had contributed within five years previous to the time of his death, a sum equal to four times the average annual earnings of the employee, but not less in any event than \$1,500 and not more in any event than \$3,500."

Counsel for respondent in support of this contention rely upon Mateeny v. Vierling Steel Works, 187 Ill. App. 448. An examination of this authority discloses that the mother of the deceased therein referred to was the sole beneficiary under the act, and it was held by the court that compensation for the pecuniary loss resulting from the death of a workman caused by injuries sustained by him in the course of his employment inured to the benefit of the surviving parent during his lifetime. This authority does not in any sense support the contention of counsel that dependency must be shown where recovery is sought under the act in favor of parents to whose support a deceased had

In re Estate of John V. Leland, deceased.

174 111. 11. 12. It was said that there was no evidence

of any evidence to support a decision of the court.

175 111. 12. It is not within the province of the court to pass

upon the evidence. It is believed that the evidence is

in the trial in the case of the family to which it

the injuries and death of deceased spouse out of his

property for respondent.

176 111. 13. It was said that prior to his death

contributed to some extent to the amount of his debts

and resided in Ireland. They were non-resident aliens,

and it is not within the province of the court to pass

upon the evidence. It is believed that the evidence is

in the trial in the case of the family to which it

the injuries and death of deceased spouse out of his

property for respondent.

"If the employee leaves any money, calls on  
creditors or debts or other financial matters to which he  
has contributed within five years previous to  
the time of his death, a claim may be made against the  
estate of the employee, but not in  
the event that the employee has not made any contribution  
to the estate of the employee."

177 111. 14. It was said that prior to his death

contributed to some extent to the amount of his debts

and resided in Ireland. They were non-resident aliens,

and it is not within the province of the court to pass

upon the evidence. It is believed that the evidence is

in the trial in the case of the family to which it

the injuries and death of deceased spouse out of his

property for respondent.

178 111. 15. It was said that prior to his death

contributed to some extent to the amount of his debts

and resided in Ireland. They were non-resident aliens,

and it is not within the province of the court to pass

upon the evidence. It is believed that the evidence is



contributed within the period fixed by the act. The question under consideration here was not determined in the Matecnv case; that case dealt in part with the question of whether the sum fixed in an award made under the act was payable in whole to the parent to whose support deceased had contributed; and, interpreting the act, the court held that the whole award was payable to the surviving parent, and that the surviving brothers and sisters, being collateral heirs, were not entitled to participate in the award under paragraph B of section 4 of the act, in the absence of any evidence tending to show that they had been dependent upon the earnings of the deceased.

Construing section 4 as a whole, we are inclined to the opinion that the legislature intended that in cases where a deceased employee had contributed in his lifetime to any of the class of persons referred to in paragraph A, it would be sufficient to authorize a recovery to show that deceased had contributed to the support of a person or of persons coming within the class enumerated in the paragraph, and that the right to recovery would not depend at all upon whether the class of persons referred to in paragraph A were dependent upon deceased for support. That this interpretation of the act is correct is further shown by paragraph B, which provides that in the case of collateral heirs such dependency upon deceased in a particular case must be shown. It is clear that the legislature intended that in the case of relatives such as those enumerated in paragraph A, they having a natural right to the aid and assistance of a deceased, it would be sufficient to show that he had contributed to their support; and that as to other relatives or heirs having no such natural claim, their



contributed within the period fixed by the act. The date-  
the under consideration here was not determined in the  
Necessity cases; that arose doubt in part with the question of  
whether the law fixed in no other words than the act was  
persons in order to the person to whom support deceased  
had contributed; now, interpreting the act, the court held  
that the whole estate was payable to the surviving parent,  
and that the surviving brothers and sisters, being collat-  
eral heirs, were not entitled to participate in the estate  
under paragraph B of section 4 of the act, in the absence  
of any evidence tending to show that they had been de-  
pendent upon the earnings of the deceased.

Constructing section 4 as a whole, we are in-  
clined to the opinion that the fiscal time intended that  
in cases where a deceased employee had contributed in his  
lifetime to any of the class of persons referred to in  
paragraph A, it would be sufficient to authorize a recovery  
to show that deceased had contributed to the support of a  
person or of persons living within the class enumerated in  
the paragraph, and that the right to recovery would not de-  
pend at all upon whether the class of persons referred to  
in paragraph A were dependent upon deceased for support.  
That this interpretation of the act is correct is further  
shown by paragraph B, which provides that in the case of  
collateral heirs who have been dependent upon deceased in a per-  
petual case must be known. It is clear that the legisla-  
ture intended that in the case of relatives who are de-  
pendent in paragraph A, they have a natural right to  
the life and assistance of a deceased, it would be sufficient to  
show that he had contributed to their support; and that he is  
either relatives or heirs within the such natural class, and

right to recovery should depend upon their ability to show dependency upon deceased for such support.

It is further urged that there can be no recovery in this case because the parents of deceased are non-resident aliens. In the case of Victor Chemical Works v. Industrial Board, supra, the Supreme Court held that the words in the title of the act, "to promote the general welfare of the people of this State," do not necessarily mean that it is the intent and purpose of the act to limit compensation that may be paid for accidental injuries or death suffered in the course of employment to citizens of the State. It was urged in that case that the act did not apply to nonresident alien dependents, and the court held that "We think it is the plain meaning and intent of the act not to except alien beneficiaries from its provisions." This authority is decisive of this question.

It is also insisted that the trial court erred in admitting evidence relating to deceased's contribution to his parents. We do not think there was any reversible error committed by the court in this connection. The evidence of Martin Lavin fairly tended to show that the deceased had contributed to the support of his parents within five years prior to his death.

It is also said that error was committed in admitting in evidence the verdict of the coroner's jury. We think the verdict of the coroner's jury was properly admitted. Victor Chemical Works v. Industrial Board, supra.

Counsel argue that error was committed in fixing the amount of the award. The evidence tends to show that the earnings of deceased were \$17.23 per week. There is contradiction in the evidence as to the usual length of time that

Information was received for this report.

— 10 —

resident aliens. In the case of Victor Ushakov, who is a

words in the title of the act, "to promote the health and

that it is the intent and purpose of the act to fill the

which resulted in the course of employment for a period of

the fact that the act did not

not to expect any communication from its provisions."

It is also pointed out that the total weight of the sample is 100 grams.

The following information was obtained from the records of the Bureau of Prisons:

NAME: [REDACTED]  
DATE OF BIRTH: [REDACTED]  
PLACE OF BIRTH: [REDACTED]  
RACE: [REDACTED]  
RELIGION: [REDACTED]  
MARRIED: [REDACTED]  
CHILDREN: [REDACTED]  
SIBLINGS: [REDACTED]  
PARENTS: [REDACTED]  
EDUCATION: [REDACTED]  
OCCUPATION: [REDACTED]  
CRIMINAL RECORD: [REDACTED]

...the fact that the document was

...to the ... ..

...to various the period of the country's history. It

[illegible]

...the amount of the ...

10-10-68

deceased was employed in each year. Respondent's evidence tends to prove that deceased was usually unemployed during the months of December, January and February, although the testimony taken at the trial discloses that the deceased was actually employed by the respondent during those months, and that he met his death while working for respondent in the month of January, 1913. There is evidence in the record in support of the findings of the court upon this question.

Other rulings of the trial court are complained of, as to which we are of opinion that no error was committed that would warrant the reversal of a judgment which seems to be fairly supported by the law and the evidence of the case.

The judgment of the Superior Court is affirmed.

**AFFIRMED.**





171 - 22598

EDWIN B. HOLMES, EDWARD A. PERKINS,  
CHARLES A. PERKINS, EDWARD W. PER-  
KINS and EDWIN P. HOLMES, trading  
as Parker, Holmes & Co.,  
Plaintiffs in Error,

vs.

SAMUEL J. F. STRAUS, Administrator  
of the Estate of I. W. BRILL, Dec'd.  
Defendant in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 305

259 - 22693

EDWIN B. HOLMES et al., trading as  
Parker, Holmes & Co.,  
Appellants,

vs.

SAMUEL J. F. STRAUS, Administrator,  
etc.,  
Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On February 28, 1912, suit was begun in the Municipal Court of Chicago by the plaintiffs, a partnership, doing business in the city of Boston, against I. W. Brill, now deceased, for \$698.03. For some time before suit was begun Brill had been employed by plaintiffs as a traveling salesman. Brill filed an affidavit of defense to plaintiffs' claim, and also a claim of set-off against the plaintiffs in the sum of \$3,753.33. Plaintiffs, by their attorney, Charles H. Burras, filed an affidavit of defense to the claim of set-off. Some months following the commencement of the suit Burras, attorney for plaintiffs, employed Henry A. Fowler, an attorney, to take charge of the case. The correspondence in the record discloses that plaintiffs' Boston attorney knew of the employment of Fowler,



although Fowler's employment and authority to represent plaintiffs does not appear of record in the case.

At the taking of certain depositions in Boston, Brill being there represented by an attorney named Jacobs, and the plaintiffs by an attorney named Knowlton, -Brill's attorney insisted on plaintiffs proving all of the items in an intricate account extending over several years. On April 10, 1913, Knowlton wrote Fowler in Chicago, advising among other things that an effort be made in Chicago to settle the controversy. Fowler does not appear to have written any answer to this letter, but he says he talked to Mr. Kaplan, Brill's Chicago attorney, about a settlement; that it was proposed between the lawyers that if each side would agree to dismiss their respective claims the matter could be disposed of. Brill refused to accept this proposition, and the taking of the depositions at Boston was never completed. Brill and Perkins, one of the plaintiffs, held a conversation in Chicago about a year after the attempt on the part of plaintiffs to take the depositions in Boston. Brill said that at this time Perkins stated that plaintiffs had abandoned the suit; this part of the conversation is denied by Perkins. No further effort was made, however, to complete the taking of the depositions, and it does not appear that plaintiffs, by their counsel, Fowler or Knowlton, made any attempt to prepare for a trial of the case.

In February, 1915, Leonard L. Cowan, an attorney, was substituted in the place of Kaplan as attorney of record for Brill; and whether the plaintiffs or their counsel received legal notice of this substitution is a much disputed question. Notice of the withdrawal of Kaplan and the sub-



and that Fowler's employment and authority to represent plaintiff  
little has not appear of record in this case.

It is the taking of certain depositions in this case.

Will being there represented by an attorney named Nathan,  
and the plaintiff by an attorney named Nathan, Nathan's  
attorney has been an plaintiff's attorney for some time.  
In an intricate account extending over several years. On  
April 10, 1915, Nathan wrote Fowler in Chicago, advising  
some other things that an effort be made in Chicago to

settle the controversy. Fowler does not appear to have  
written any answer to this letter, but he says he talked to  
Mr. Nathan, Will's Chicago attorney, about a settlement;  
that it was proposed between the lawyers that if each side

would agree to discuss their respective claims the matter  
could be disposed of. Will refused to accept this proposal,  
and the taking of the depositions at Boston was never  
completed. Will and Nathan, one of the plaintiffs, held  
a conversation in Chicago about a year after the taking of  
the part of plaintiffs to take the depositions in Boston.

Will said that at this time Nathan stated that plaintiffs  
had abandoned the suit; this part of the conversation is de-  
nied by Nathan. No further effort was made, however, to  
complete the taking of the depositions, and it does not ap-  
pear that plaintiffs, by their counsel, Fowler or Nathan,  
made any attempt to prepare for a trial of the case.

In February, 1915, Nathan J. Green, an attorney,

was substituted in the place of Nathan as attorney for Nathan  
for Will; and whether the plaintiff or their counsel re-  
ceived legal notice of this substitution is a much disputed  
question. Notice of the withdrawal of Nathan and the sub-

stitution of Cowan was addressed to Burras and to Fowler, in which it was stated that Cowan would appear in court on February 15, 1915, and move for the entry of an order allowing the substitution. The case had been reached for trial 19 times prior to February 15, 1915, and had been continued or passed.

Mr. Fowler, testifying concerning the service of the notice, said that when Cowan brought the notice to him he told Cowan that it was Burras' case and that he would have to see Burras; that if Kaplan was out of the case he, Fowler, would have nothing further to do with it; that he, Fowler, had called up Burras on February 13, 1915; that he could not say whether he had talked with Burras himself or not, but that he did leave word that "I had got this notice." Neither Burras nor Fowler paid any further attention to the case until August, 1915.

The record discloses that the cause had been continued several times following the substitution of attorneys and until May 6, 1915, when judgment was entered in favor of the defendant on his set-off. The case appeared upon the published trial call for several days before judgment was entered, under the correct number but under the title "Packer v. Bull."

The judgment order recites:

"This cause coming on to be heard upon the regular trial call of this date, and it appearing to the court that this suit was started as a fourth class suit, and that a set-off has been filed herein for the sum of \$3,753.53. It is ordered that said set-off be allowed to stand upon the payment by said defendant of the usual costs required to be paid by plaintiff in cases of the first class in this court.

\* \* \* \* \*

"Now comes the defendant in this cause, the plaintiffs being absent and not represented, and thereupon this cause comes on in regular course for trial before the court without a jury, and the court having heard the evi-





dence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit: The court finds the issues against the plaintiffs on defendant's claim of set-off, and assesses the defendant's damages at the sum of \$3,753.53."

In August, 1915, plaintiffs were first apprised of this judgment, and they at once sought information of their attorney, Burras, and their Boston attorney wrote Fowler asking for an explanation of the matter.

On September 21, 1915, plaintiffs filed a petition to vacate the judgment entered May 6, 1915. An answer to this petition was filed, and a replication was also filed to the answer. On July 13, 1916, an order was entered of record which provided, in substance, that the motion to vacate the judgment "be denied and that the petition to vacate said judgment be dismissed," and that "the court having heard the evidence of both parties and the arguments of counsel finds:

"First. That the court had jurisdiction to enter the judgment sought to be set aside.

Second. That there was neither fraud, accident nor mistake in the entry of said judgment.

Third. That by negligence of the plaintiffs and their attorneys they failed to prosecute their case; they neglected to take the steps necessary to have it ready for trial; they failed and neglected to watch their case when it appeared in its regular place on the trial call and failed and neglected to be present on the hearing of said case."

An appeal from this order of the Municipal Court has been taken to this court by plaintiffs, who also bring here by writ of error for review the original judgment of the Municipal Court in favor of the defendant. The appeal, being General No. 22693, and the writ of error, No. 22598, have by order of court been consolidated for hearing.

It is urged by the plaintiffs that the judgment and order should both be reversed and the cause remanded for



and the arguments of counsel, and since this is  
viewed in the present, before the following finding, as  
with the court finds the issues against the plaintiff  
on defendant's claim of self-defense, and awards the  
defendant's damages of the sum of \$5,755.00."

In August, 1915, plaintiffs were first notified

of said judgment, and that at once sought information as

their attorney, letters, and their Boston attorney wrote

plaintiff asking for an explanation of the matter.

On September 11, 1915, plaintiffs filed a pe-

tition to vacate the judgment entered May 2, 1915, and

answer to this petition was filed, and a resolution was

also filed to the answer. On July 13, 1916, an order was

entered of record which provided, in substance, that the pe-

tition to vacate the judgment "be denied and that the pe-

tition to vacate said judgment be dismissed," and that

"the court having heard the evidence of both parties and

the arguments of counsel finds:

"First. That the court had jurisdiction to

enter the judgment sought to be set aside.

Second. That there was neither fraud, accident

nor mistake in the entry of said judgment.

Third. That by negligence of the plaintiffs and

their attorneys they failed to prosecute their case; they

neglected to show the steps necessary to have it ready for

trial; they failed and neglected to notify their case when

it appeared in the regular place on the trial roll and

failed and neglected to be present on the hearing of said

case."

So appeal from this order of the Superior Court

has been taken to this court by plaintiffs, who also bring with

by writ of error for review the original judgment of the Su-

perior Court in favor of the defendant. The original being

General No. 22357, and the writ of error, No. 22358, both by

order of court been consolidated for hearing.

It is urged by the plaintiffs that the judgment

and order should both be reversed and the case remanded for

a new trial, for the reason that the Municipal Court had no jurisdiction to enter the order in question and that it had, under the circumstances of the case, exceeded its jurisdiction at the time it entered the judgment; and, second, that the judgment against plaintiffs should be set aside in that it was the result of either fraud, accident or mistake.

In support of their first contention plaintiffs urge that the Municipal Court had no power to hear and determine the defendant's cross-demand "except it was commenced and prosecuted as a first class cause"; that the filing of the counter claim of the defendant, in a suit brought by the plaintiffs to recover a judgment in a fourth class cause of action, was in legal effect a mere nullity; that the claim of defendant which it was sought to set off against the plaintiffs' demand was for the sum of \$3,753.53; that the defendant's claim of set-off could not be enforced in the action brought by plaintiffs, and that the court was without jurisdiction, or exceeded its jurisdiction, when it entered an order directing the clerk of the court to transfer the set-off demand of the defendant from a fourth class to a first class claim; and that in any event counsel for plaintiffs should have received notice of the motion to so transfer the claim of defendant. The clerk by direction of the court gave to the set-off claim of defendant a new general number. The cause, in the absence of plaintiffs, thereupon proceeded to trial and judgment.

It is insisted on the one hand that the power of the court to enter the order in question was jurisdictional - that the court was wholly without power to enter the order. On the other hand it is urged that it is not a question of jurisdiction in any sense, but that it is merely a matter of legal procedure.

[illegible]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

உலர் பகுதி : கன்னட மொழி 1957-58 ஆம் ஆண்டில் இவ் பகுதியில் 1,00,00,000 க்கு மேல் பேசுவோர் இருந்தனர்.

[illegible]

DECLASSIFICATION AUTHORITY DERIVED FROM:

William was a terrific leader and was a great person to work for.

170 feet of surface and 11 miles beneath to waste and sand

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CONFIDENTIAL - SECURITY INFORMATION

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Approved and signed: \_\_\_\_\_  
Special Agent in Charge

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To receive all this help you are not on instant at all.

• *Journal of the American Academy of Child and Adolescent Psychiatry* 45:10 (October 2006): 1293-1301.

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For information on the *Journal of Management Education*, contact the Editor, Dr. Robert L. Kegan, at the address above or by e-mail at [editor@jme.sagepub.com](mailto:editor@jme.sagepub.com).

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Section 2 of the Municipal Court Act gives that court jurisdiction in cases which are, by the act, divided into six classes, and a separate practice and procedure is provided for each class of cases. The jurisdiction in first class cases is limited generally to cases where it is sought to recover an amount in excess of \$1,000, either in money or personal property; and in cases of the fourth class the jurisdiction is limited to cases where the amount sued for is not greater than \$1,000.

In Chicago Title & Trust Co. v. Kemler Lumber Co., 151 Ill. App. 579, a plea of set-off for \$2,000 was stricken from the files in a fourth class case. Deciding the case the court said:

"This action is of the fourth class in the Municipal Court and the claim of set-off would come within those causes cognizable as of the first class. Had the plea of set-off been such as to have brought the cross-cause into the fourth class under the Municipal Court Act, then the plea should have been allowed to stand; but it clearly came within another class and was not, for that reason, germane to the main suit or a proper subject of counter-claim. No written pleadings were required in the main suit, while such pleadings are made necessary in cases of the first class, of which class was defendant's counterclaim. In the two classes different scales of costs obtain."

Since the above decision was written the Municipal Court has adopted the rule following:

"In all cases of the first class instituted in this court on and after April 1, 1910, the pleadings shall be the same as in the cases of the fourth class, and they may be amended in the same manner."

The adoption of this rule by the Municipal Court has abolished practically every difference that formerly existed in the practice and procedure in that court in cases of the fourth and first classes. It is true that there still exist under the act somewhat different scales of costs applicable to cases of these different classes, but we do not think that this difference is of such nature as to warrant a holding that





a set-off arising under one of these classes may not legally be urged in a suit brought under another of such classes. Under the rules of the Municipal Court as they now are, there is no substantial difference in the practice in cases of the first class and cases of the fourth class; and hence we are inclined to agree with counsel for defendant that the court did have inherent power to enter the order herein complained of; in other words, the question presented here is one of practice and procedure.

It is provided by section 52 of the Municipal Court Act that where the method of procedure is not sufficiently prescribed by the act or by any rule of the court, the court may make such provision for the conduct and disposition of a case as may appear to the court proper for the just determination of the rights of the parties. The rules of the Municipal Court are silent with reference to the power of the court to enter the order here in question, and we are inclined to the opinion that in view of the adoption of Rule 14, above quoted, the trial judge had the power to enter the order in question.

It is further earnestly insisted by counsel for plaintiffs that neither plaintiffs nor their counsel have been guilty of such negligence as precludes their right to relief as set forth in their petition to vacate the judgment in favor of defendant. We believe that the evidence heard on the motion to vacate this judgment does not support this contention. The record discloses that from the time the suit was begun until the judgment was entered on May 6, 1915, the cause had been continued no less than 22 times. Mr. Burras, attorney for plaintiffs, had, with the subsequent knowledge of the local attorney

the question presented here is one of practice and procedure, and since we are inclined to say with approval for precedent that the court will have inherent power to enter the order herein complained of; in other words, the question presented here is one of practice and procedure, and since we are inclined to say with approval for precedent that the court will have inherent power to enter the order herein complained of; in other words,

It is further expressly limited by reason of

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of plaintiffs in Boston, employed Mr. Fowler to represent plaintiffs in the proceedings in the Municipal Court. Mr. Burras from that moment paid no further attention to the case, and the attorney whom he employed to do this work for him never filed his appearance in the cause. It is quite true that during part of the time that the case was pending counsel for the parties had under discussion a proposition for the settlement of the controversy, but this fact in and of itself did not authorize counsel for the plaintiffs to assume anything with reference to the time or manner of the final disposition of the cause. Brill, the defendant, at no time authorized his counsel - nor did his counsel seem to have the authority - to settle the controversy on the terms proposed. That a tentative suggestion for a settlement was pending is without doubt, but we do not think that this fact justified counsel for plaintiffs to relax in the vigilance that they should have exercised in protecting the rights of their clients.

The record discloses that there was some question as to whether either Burras or Fowler had been notified of the substitution of Mr. Cowan as attorney for Brill. Fowler admits that he had such notice two days before the order of substitution was entered, and he further testifies that he notified Mr. Burras, or someone in Burras' office, of the application that was to be made on February 15, 1915, for the entry of the order. Fowler having received this notice and, as he says, having communicated it to Mr. Burras, it next appears that neither Mr. Burras nor any other person on behalf of the plaintiffs made any move to protect the rights of plaintiffs until the August succeeding. The cause was continued three or four times following February 15, 1915, when the order was entered, and prior to the entry of the judgment



of plaintiff's is based, however, on the fact that plaintiff is the proprietor of the business in the building owned by him. It is true that plaintiff has no further interest in the case, and the objection was made as to his being called as a witness. It is for him never filed his appearance in the case. It is also true that during part of the time that the case was pending counsel for the parties had under discussion a proposition for the settlement of the controversy, but this went in and of itself did not authorize counsel for the plaintiff to make any kind of reference to the time or manner of the final disposition of the case. Still, the defendant, at no time authorized his counsel - nor did his counsel seem to have the authority - to make the suggestion very much as the same proposed. That a tentative suggestion for a settlement was pending is without doubt, but we do not believe that this fact justified counsel for plaintiff to refer in the vigilance case any words which have been used in proceeding the rights of their clients.

The record indicates that there was some question as to whether either party or both had been notified of the withdrawal of Mr. Green as attorney for the plaintiff. It is stated that the plaintiff had given notice to the order of withdrawal was entered, and the further facilities were not notified Mr. Green, or someone in his name, of the withdrawal. It is also stated that one of the cases on February 10, 1911, for the entry of the order. Further having received this notice was on the same day communicated to Mr. Green, it was stated that Mr. Green did not say a word between on March 11 the plaintiff made up words to suggest the kind of plaintiff could the subject mentioned. The order was entered on the same day following February 10, 1911, when the order was entered, and prior to the entry of the judgment.

on May 6, 1915, and the case appeared on the trial call of the court several days before it was finally reached for trial. While it is evident that there was an error in the published trial call of the Municipal Court in the title of the case, it is conceded that the correct number of the case was given therein, and we are inclined to believe that this was sufficient notice to plaintiffs' counsel. It should be borne in mind that the judgment was entered when the case, in its order, was reached upon the trial call of the Municipal Court, and that court had the power during the course of the trial - if it can be said that the question here under consideration was one of procedure - to enter any order which it had jurisdiction to enter, without special notice to the plaintiffs or their counsel; in other words, the law presumes, in the absence of fraud, accident or mutual mistake, that all parties interested in a cause are present in court during the course of the trial. Counsel for plaintiffs seem to admit in their brief that the Municipal Court had the power to enter the order for a transfer of the set-off claim from the fourth to the first class. In their petition to set the judgment aside they ask that the case be re-heard by the Municipal Court on plaintiffs' demand and upon the defendant's cross-demand, and, so far as we are able to discover from the records brought here, the contention that the court was without power to enter the order complained of is first made by plaintiffs in this court.

The Municipal Court had power to enter the order in question, and the plaintiffs had ample opportunity to be present in court at the time of the trial of the cause had they or their attorneys been exercising due care and diligence. The order of the Municipal Court in General No. 22693 and the judgment of that court in General No. 22598 are affirmed.

**AFFIRMED.**

Mr. Justice Holdom dissents.

On May 6, 1911, and the same appeared on the trial roll at the court several days before it was finally removed from the trial. While it is evident that there was an error in the preliminary trial roll of the original case in the filing of the case, it is contended that the correct number of the case was given to the court, and the inclusion is believed that this was within the right of the plaintiff's counsel. It should be noted in this case that the judgment was entered when the case, in its original form, was removed from the trial roll of the original case, and that court had the power during the hearing of the case. It is now being said that the question here under consideration was one of procedure - to enter only on the trial roll of the case to enter, without special notice to the plaintiff or the defendant, in which case, the law provides, that all parties be notified of the removal of the case, and that all parties be notified in a hearing and present in court during the hearing of the trial. Certainly the plaintiff's case to enter in the trial roll of the original case had the power to enter the case for a transfer of the case from the trial roll of the first case. In their petition to set the judgment aside they ask that the case be re-heard by the original court in plaintiff's case and upon the defendant's cross-motion, and so far as we are able to ascertain from the records provided here, the contention that the court was without power to do so for the order complained of is first made by plaintiff's counsel.

The defendant's counsel had power to enter the case for a transfer, and the plaintiff's counsel was not present in court at the time of the trial of the case and that their efforts were maintained due care and diligence. The order of the original court is hereby set aside and the judgment is hereby set aside in 1911 and 1912 and 1913.



PEOPLE OF THE STATE OF ILLINOIS,  
for use of HENSCHEL M. BYALL,  
Admr. Estate of Amy Young, decd.,  
Appellant,

vs.

ANNA M. RIGDON and FEDERAL UNION  
SURETY COMPANY,

Appellees.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

204 I.A. 309

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff against the defendants on an administrator's bond. The amended declaration consists of two counts, in the first of which it is alleged that the defendant Anna M. Rigdon on July 30, 1910, was appointed administratrix of the estate of Charles W. Rigdon, deceased, by the Probate Court of Cook County, Illinois; that she executed her administratrix' bond in the sum of \$15,000, with the Federal Union Surety Company, a defendant, as surety, conditioned that if she should well and truly administer all the goods, etc., of the estate and should distribute the same to the persons and parties entitled thereto, then the obligation of the bond was to be void.

As a breach of the conditions of the bond it was alleged that Charles W. Rigdon, deceased, died intestate July 15, 1910, leaving him surviving as his only heirs at law the said Anna M. Rigdon, his widow, and Jay A. Rigdon, his son; that on February 3, 1911, the said Anna M. Rigdon filed an inventory from which it appeared that there had come into her possession as administratrix assets belonging to the estate of her deceased husband of the value of \$46,026.50; that said inventory was approved by the Probate Court; that on February 11, 1911, the said Jay A. Rigdon, for



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WILLIAM L. BROWN, JR. & SONS, INC.  
NEW YORK, N. Y.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

This is a motion brought by defendant's counsel, the defendant, an administrator's bond. The motion was made on the first of two counts, in the first of which it is alleged that the defendant Anna M. Wilson on July 30, 1917, was appointed administratrix of the estate of Charles E. Wilson, deceased, by the Probate Court of Cook County, Illinois; that she executed her administrator's bond in the sum of \$15,000, with the Federal Union Surety Company, a defendant, as surety, conditioned that if she should fail and duly administer all the goods, etc., of the estate and should distribute the same to the persons and parties entitled thereto, then the collection of the bond was to be held.

As a result of the certification of the land it was  
 alleged that Charles W. Hixson, deceased, died intestate  
 July 18, 1910, leaving him surviving no his only heirs at  
 law the said Anna E. Hixson, his widow, and his A. Hixson,  
 his son; that on February 3, 1911, the said Anna E. Hixson  
 filed an inventory from which it appeared that there had  
 come into her possession an administrative estate belonging  
 to the estate of her deceased husband of the value of  
 \$40,000.00; that said inventory was approved by the probate  
 court; that on February 11, 1911, she sold her A. Hixson, her

a valuable consideration, assigned to Amy Young, plaintiff's intestate, all his right, title and interest in and to the estate of Charles W. Rigdon, deceased; that said interest consisted of an undivided two-thirds of said estate remaining after the payment of certain debts, costs, etc.; that due notice of such sale and assignment was given to said Anna M. Rigdon, administratrix, and that said sale and assignment was spread of record on the records of the Probate Court of Cook County, which fact was also known to the said Anna M. Rigdon; that on January 31, 1913, the said Anna M. Rigdon filed in the Probate Court her final account from which it appeared that she had in her hands and possession the distributive share of the said Jay A. Rigdon in said estate of the value of \$20,000, and that said Jay A. Rigdon would have been entitled to receive said property as his distributive share of the estate of said Charles W. Rigdon but for his sale and assignment to the said Amy Young, deceased; that on March 13, 1913, an order was entered of record by the Probate Court directing the distribution of the property in the hands of the said administratrix to the parties entitled thereto; that subsequently a further order was entered in said court in said estate as follows:

"Now comes Anna M. Rigdon, administratrix of the estate of Charles W. Rigdon, deceased, and the court being fully advised in the premises, it is ordered, adjudged and decreed that Anna M. Rigdon, administratrix, deliver to Jay A. Rigdon, heir at law of Charles W. Rigdon, deceased, all the property and assets now in her hands belonging to said heir in said estate."

It is further alleged in said count in substance that at the time said orders were entered there were no assets in the hands of said Anna M. Rigdon, administratrix, belonging to the said Jay A. Rigdon, and that by reason of the orders of the Probate Court it became the duty of said Anna M.

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Rigdon to deliver the property in question to the said Amy Young, but that this she has failed and refused to do; that since April 25, 1915, the said Amy Young died intestate, and the said Herschel M. Byall, plaintiff herein, was appointed administrator of her estate.

The second count of the declaration is identical with the first except that it alleges the giving of an additional bond, with the Federal Union Surety Company, defendant, as surety.

The court sustained demurrers to this amended declaration, and the plaintiff having elected to stand by his declaration judgment was entered in favor of the defendants, and the case is brought here by appeal for review.

The only question in controversy here is as to the power of the Probate Court to determine "the validity of a disputed assignment by an heir of his interest in a decedent's estate, or to adjudicate the conflicting claims of the parties to such assignment." Section 220, chapter 37, Hurd's 1916 Revised Statutes, provides as follows:

"Probate Courts shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts, and in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts."

Counsel for plaintiff insist that the decision of this appeal depends upon whatever construction may be given by the court to the language, "jurisdiction in all matters of probate," and "the settlement of the estates of deceased persons," as this language is used in the above section. In Frackelton v. Masters, 249 Ill. 30, relied upon by plaintiff, the court held that the attempt of the legislature to invest probate courts with general equity juris-



Held to deliver the property in question to the said Mrs. Young, but that this was not done and returned to her; that since April 25, 1915, the said Mrs. Young has been in possession of the said property, and the said Mrs. Young, plaintiff herein, was appointed administrator of her estate.

The second count of the declaration is identical with the first except that it alleges the giving of an additional bond, with the Federal Union Surety Company, defendant, as surety.

The court sustained demursers to this amended declaration, and the plaintiff having elected to stand by his declaration judgment was entered in favor of the defendant, and the case is brought here by appeal for review. The only question is whether or not there is an error in the court's decision.

The power of the Probate Court to determine the validity of a claimed assignment by an heir of his interest in a decedent's estate, or to adjudicate the constitutionality of the terms of such assignment, is provided for in section 27, which reads as follows:

"Probate courts shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of executors and administrators and settlement of their accounts, and in all matters relating to appraisals, and in cases of the sale of real estate of deceased persons for the payment of debts."

Concededly the plaintiff herein does not question the validity of this appeal, and the question now before the court is whether or not the plaintiff is entitled to the judgment. The court is of the opinion that the plaintiff is not entitled to the judgment, and the court will enter judgment in favor of the defendant. The court is of the opinion that the plaintiff is not entitled to the judgment, and the court will enter judgment in favor of the defendant. The court is of the opinion that the plaintiff is not entitled to the judgment, and the court will enter judgment in favor of the defendant. The court is of the opinion that the plaintiff is not entitled to the judgment, and the court will enter judgment in favor of the defendant.

diction in such manner as to give them control and supervision over testamentary trusts was illegal. An examination of this authority will disclose that the Supreme Court was of the opinion that the legislature had attempted to clothe the Probate Court with a general equity jurisdiction with relation to questions not in their nature "probate matters" within the meaning of section 20 of article 6 of the State constitution. "'Probate matters,' as used in the constitution, mean matters pertaining to the settlement of the estates of deceased persons. The administration of testamentary trusts has no more relation to the settlement of the estates of deceased persons than the foreclosure of mortgages \* \*."

The settlement of the matter in controversy here became a condition precedent to a final settlement of the estate of the deceased, Charles W. Rigdon. While this question was left open, if counsel for the defendants is correct in his contention that the Probate Court had no jurisdiction to determine the matter, the administratrix of the estate could not have presented her final account for approval without first assuming the responsibility of determining the rights of rival claimants to a distributive share of said estate.

In Shepherd v. Clark, 38 Ill. App. 66, it appears that a testator by his will provided that his estate should be divided into nine equal parts, one part to be paid to each of his living children, etc. The lands of the testator were sold under the direction of the County Court. One Millie Clark filed her petition in that court alleging that one of the said children had sold to her all of his interest in the land of the decedent, and she prayed in the petition for a share of the proceeds of the sale of the lands.





The County Court dismissed her petition without prejudice; she appealed to the Circuit Court, which held that she was entitled to the distributive share she sought by her petition. From the judgment of the Circuit Court an appeal was taken to the Appellate Court. In affirming the judgment of the Circuit Court the Appellate Court said:

"Just what matters are embraced in the general terms 'probate matters,' 'settlements of estates of deceased persons' and 'adjustment of accounts of executors and administrators,' it may be difficult to determine; but in any view that can be reasonably or plausibly taken, it would seem that to the tribunal clothed with jurisdiction of them, some equitable power must appertain. By the estate of a deceased person is meant the property of all kinds belonging to such person at the time of his death. To 'settle' it, would seem to involve its ascertainment, discovery, collection and disposition to those legally or equitably entitled. \* \* \* The persons entitled may be designated by will of the deceased, or ascertained by the law, upon other facts duly shown. The right, once vested in persons so ascertained, may pass to others before the estate is settled, by their death, or marriage, or insolvency, or contract - events and transactions never contemplated by the deceased - and it may be purely equitable. \* \* \* It is conceded that some of these questions are within the jurisdiction of the County Court. \* \* But it is insisted that \* \* appellee was neither an heir, a legatee, nor a creditor of the estate; \* \* that the trial of the right as between her and Amos W. Kellar is not involved in the settlement of the estate; \* \* and that the County Court could not entertain jurisdiction of such a controversy. \* \* But if it further appeared that the interest of any such had passed by operation of law, or by their own undisputed and lawful act, we see no impropriety or usurpation in its finding the fact and ordering payment to the person really entitled."

It is insisted by counsel for the plaintiff that the above case cannot be considered in point for the reason that the opinion of the Appellate Court indicates that the "assignor was present by his attorney and did not dispute the fact, nor make any objection to the order she asked," and that it appears from the language of the court that the case presented a question of an undisputed assignment by a legatee. An examination of this authority will disclose that it was claimed in the Appellate Court that the County Court had no



The County Court dismissed her petition without prejudice; she appeared to the Circuit Court, which said that she was entitled to the distributive share she sought by her petition. From the judgment of the Circuit Court an appeal was taken to the Appellate Court. In affirming the judgment of the Circuit Court the Appellate Court said:

"Just what matters are embraced in the phrase 'personal estate,' 'real estate' or 'estate of real estate,' and 'adjustment of accounts of executors and administrators,' it may be difficult to determine; but in any view that can be reasonably or judicially taken, it will seem that to the judicial cognate with jurisdiction of these, some equitable power must be given. By the estate of a deceased person is meant the property of all kinds belonging to such person at the time of his death. To 'settle' is, 'to divide and divide his estate, discovery, discovery and collection and division to divide legally or equitably and justly.' The persons entitled may be designated by will of the decedent, or ascertained by the law, even when local duty known. The right, once vested in persons so designated, may pass to others before the estate is settled, by their death, or marriage, or insolvency, or otherwise - events and transactions never contemplated by the decedent - and it may be purely equitable. \* \* \* It is conceded that some of these questions are within the jurisdiction of the County Court. \* \* \* But it is insisted that \* \* \* appellate jurisdiction is not within the jurisdiction of the County Court. \* \* \* That the County Court is not invested with the jurisdiction of the estate; \* \* \* and that the County Court could not interfere in jurisdiction of such a case - very. \* \* \* But if it further appeared that the judgment of any court was reversed by operation of law, or by the own undisturbed and lawful act, we see no propriety or objection in its finding the fact and setting the same to the person really entitled."

It is insisted by counsel for the plaintiff that the above case cannot be considered as precedent for the reason that the opinion of the Appellate Court is limited to the "assignment was present by his attorney and it did not state the fact, nor make any objection to the other side," and that it appears from the language of the Court that the case presented a question of an undisturbed assignment by a trustee. An examination of this case will disclose that it was claimed in the Appellate Court that the County Court had no

jurisdiction of the matter in controversy. This question was directly presented to the Appellate Court, and as we view the matter it is not material whether the assignment was or was not disputed in the County court. Jurisdiction of the subject matter cannot be given to a court by consent of the parties; if the County Court did not have jurisdiction of the matter in question in the Shephard v. Clark case, supra, then it could not have adjudicated the right of the petitioner to the property or fund which she claimed.

Bennett v. Bennett, 168 Ill. App. 658, is a case involving a somewhat complicated set of facts, but not different in principle from those in the instant case. In its opinion the court said:

"The fund in question was in the hands of the administrator, subject to the order of the Probate Court; all parties in interest were present. The Probate Court thus had jurisdiction of both the subject-matter and the parties. It would seem that upon reason and principle, such court, possessing as it did, full equitable powers in the administration of estates of deceased persons, had jurisdiction to adjust the equitable rights of the parties to such fund."

It should be noted that we do not say that the Probate Court had as a matter of independent original jurisdiction the power to determine the right of the plaintiff to the fund in question, it being our view that this jurisdiction attaches as an equitable power necessarily incident to the power of the court to settle the estate of the decedent. "It has been repeatedly held that the Probate court may exercise equitable jurisdiction in the settlement of estates - not its full jurisdiction, but such as is adapted to its organization and the mode of proceeding in that tribunal. \* \* \* Indeed, the right of the Probate court to exercise equitable jurisdiction in the settlement of estates, when necessary to further the ends of justice, has been recognized and sustained

jurisdiction of the court is unquestioned. This question was directly presented to the Supreme Court, and as we view the matter it is not material whether the judgment was or was not displayed in the County Court. Undoubtedly in the subject matter cannot be given to a court by consent of the parties; if the County Court did not have jurisdiction of the matter in question in the Shelby v. Hark case, Shelby, then it could not have adjudicated the right of the petitioner to the property on land which she claimed.

Shelby v. Hark, 188 Ill. App. 488, is a case involving a somewhat complicated set of facts, but not different in principle from those in the instant case. In the opinion the court said:

"The fund in question was in the hands of the administrator, subject to the order of the Probate Court; all parties in interest were present. The Probate Court has jurisdiction of both the subject-matter and the parties. It would seem that upon reason and principle, such court, exercising as it did, full jurisdiction over the administration of estates of decedents, has jurisdiction to adjust the equitable rights of the parties to such fund."

It should be noted that we do not say that the Probate Court had as a matter of independent original jurisdiction the power to determine the right of the plaintiff to the fund in question, in using our view that this jurisdiction attaches as an incident to the exercise of the power of the court to settle the estate of the decedent. "It has been repeatedly held that the Probate Court may determine equitable jurisdiction in the settlement of estates - not the full jurisdiction, but such as is required in the exercise of its power of administration in that tribunal. We are inclined, the right of the Probate Court to exercise equitable jurisdiction in the settlement of estates, when necessary to further the ends of justice, has been recognized and sustained



in many cases." Shepard v. Speer, 140 Ill. 238.

Counsel for plaintiff have called our attention to and have quoted from the decisions of courts of other states. Certain of these decisions seem to support the contention made by counsel, but the holdings of the courts of review of this state leave but small doubt as to the power of the Probate Court to adjudicate upon a matter such as in involved in the case at bar. It is shown by the record that there was filed in the Probate Court a copy of the assignment to plaintiff, and it is insisted that this was notice to the defendants of the rights and interests of plaintiff in the distributive share of the assignor, Jay A. Rigdon, in the estate of Charles W. Rigdon, deceased; but, assuming this to be as alleged, it cannot therefrom be said that this notice imposed upon the administratrix the obligation of determining the validity of the claim of the plaintiff. The plaintiff must be presumed to have known that the Probate Court had ample jurisdiction to determine her right to the property in question, and her failure to petition that court, or to seek relief in any other court of competent jurisdiction, before the final settlement of the deceased's estate, must be held as a bar to her right of action in this suit.

We are of opinion that the Probate Court, as incidental to its jurisdiction to settle and distribute the assets of the decedent, Charles W. Rigdon, had the power to determine the rights and interests of the plaintiff in and to a distributive share of the estate of said deceased, and that the order of that court directing distribution to Jay A. Rigdon of the share of the estate claimed by the plaintiff, and the approval by the Probate Court of the final account filed by Anna M. Rigdon as administratrix of the estate of Charles



in many cases." Shaw v. Shaw, 120 Ill. 525.

However the plaintiff have failed her objection

to and have quoted from the decisions of courts of other

states. Certain of these decisions seem to support the con-

struction made by counsel, but the holdings of the courts of

review of this case leave but small doubt as to the power of

the Probate Court to adjudicate upon a matter such as is in-

voiced in the case at bar. It is shown by the records that

there was filed in said Probate Court a copy of the will in-

quest to be admitted, and it is insisted that this was notice

to the defendants of the rights and interests of plaintiff in

the distributive share of the estate, but A. Rigdon, in the

estate of Charles F. Rigdon, deceased; and, claiming this as

as he alleged, it cannot be shown by said will notice

imposed upon the administrator the obligation of ascertaining

the validity of the claim of the plaintiff. The plaintiff must

be presumed to have known that the Probate Court had made

jurisdiction to determine her right to the property in ques-

tion, and her failure to petition that court, or to seek re-

view in any other court of competent jurisdiction, before the

final settlement of the deceased's estate, must be held as a

bar to her right of action in this suit.

We are of opinion that the Probate Court, in its

exercise of its jurisdiction to settle and distribute the es-

tate of the deceased, Charles F. Rigdon, had the power to

determine the rights and interests of the plaintiff in and to

a distributive share of the estate of said deceased, and that

the order of that court directing distribution to J. A. Wil-

son of the estate of the deceased claimed by the plaintiff, and

the removal by the Probate Court of the final account filed

by Anne F. Rigdon as administratrix of the estate of Charles

W. Rigdon, deceased, are a bar to the right of action of the plaintiff.

Counsel for defendants has presented other questions for our consideration, but in view of the foregoing we do not deem it necessary to pass upon them.

The judgment of the Superior Court is affirmed.

AFFIRMED.

W. Light, deceased, was a son of Mrs. Light, of Boston, Mass.

General for information and guidance of your office.  
 Yours truly,  
 The Adjutant General of the United States

THE OLD COLONY TRUST AND SAVINGS )  
BANK, a corporation, )  
Appellant, )

vs.

LOUISE HIRTSEL, )  
Appellee. )

Appeal from  
Municipal Court  
of Chicago.

204 I.A. 311

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal Court, brought by the plaintiff against the defendant to recover the sum of \$531.80, upon a written guarantee of payment upon a promissory note. In an affidavit of merits filed by the defendant she alleged, as a defense to the action, that she was not liable as guarantor on the note in question for the reason that the said note had been fully paid.

Trial was had before the court without a jury. Plaintiff introduced the note in evidence. The defendant was sworn as a witness in her own behalf, and after the conclusion of her testimony on direct, her cross-examination by counsel for the plaintiff was begun, and after it had continued for some time, in answer to a question by counsel for plaintiff the witness answered, "I don't know that." The colloquy following <sup>then</sup> took place between counsel for plaintiff and the court:

THE COURT: "She says she does not know. What is the use of wasting time?"

MR. PETERSON: "I ask for a non-suit in this case."

THE COURT: "Judgment will be in favor of the defendant."

MR. PETERSON: "I object to it if the court please."

It is insisted by counsel for the plaintiff that the refusal of the court to enter an order of non-suit in the cause



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was such error as compels a reversal of the judgment.

Section 30 of the Municipal Court Act provides as follows:

"Every person desirous of suffering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its finding."

The trial judge in the case at bar, so far as the record shows, entered judgment in favor of the defendant before counsel for the plaintiff had concluded his cross-examination of the defendant; the plaintiff was not permitted to introduce any evidence in rebuttal of the testimony of defendant, had it chosen to offer such evidence, and the trial court had not announced its findings at the time counsel for plaintiff made his motion for a non-suit. This motion should have been allowed by the court. On the facts disclosed by the record in this case the trial court had no discretion in the matter of the order requested by plaintiff; plaintiff was entitled to the entry of the order of non-suit as a matter of law. Daube v. Kuppenheimer, 195 Ill. App. 89; Springer v. The Campbell Co., 174 Ill. App. 278.

The judgment of the Municipal Court is reversed and the cause is remanded to that court with directions to enter the order in the cause as requested by plaintiff.

REVERSED AND REMANDED  
WITH DIRECTIONS.

THE BOARD OF DIRECTORS OF THE UNIVERSITY OF CALIFORNIA  
HAS THIS DAY APPROVED THE FOLLOWING RESOLUTIONS:

RESOLUTION

"Whereas the University of California is a public institution of higher learning and it is the duty of the Board of Directors to see that the funds of the University are properly managed and expended for the benefit of the University and the people of the State; and

Whereas the Board of Directors has the honor to receive from the

Board of Directors of the University of California the following

report of the Board of Directors of the University of California:

That the Board of Directors of the University of California has

the honor to receive from the Board of Directors of the University of California

the following report of the Board of Directors of the University of California:

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the following report of the Board of Directors of the University of California:

That the Board of Directors of the University of California has

the honor to receive from the Board of Directors of the University of California

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ILLINOIS SMELTING & REFINING  
COMPANY, a corporation,  
Appellant,

vs.

CYCLONE FENCE COMPANY,  
Appellee.

)  
APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 312

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court to recover the sum of \$331.96, which it claims is the balance due on a sale and delivery to defendant of 11,675 pounds of sheet zinc at 6-7/8 cents per pound. By way of recoupment defendant pleaded that the plaintiff agreed to sell it 40,000 pounds of sheet zinc; that plaintiff delivered only 11,675 pounds, and that it, defendant, was compelled to purchase the balance in open market at an increase of 1-1/8 cents per pound; and also that defendant was forced to pay \$2.80 and \$10.50 for returning certain antimonial lead which plaintiff had shipped to defendant without its knowledge or consent; that \$470.70, which plaintiff says was paid on account, was in fact paid on an accord and satisfaction.

After hearing all of the evidence relating to the claim of plaintiff and the defense of defendant in support of the allegations in its plea above referred to, the court permitted defendant to file an amended affidavit of merits setting up that there had been an accord and satisfaction of the matters in dispute between the parties. The case was tried without a jury, and the finding and judgment were in favor of the defendant. The plaintiff brings the case here by appeal for review.



INDUSTRIAL EXHIBITS & EQUIPMENT  
COMPANY, a corporation,  
Appellant.

vs.

OVERSEA TRADING COMPANY,  
Respondent.

MUNICIPAL COURT  
OF CALIFORNIA

204 I.A. 312

THE FOLLOWING IS THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court to recover the sum of \$331.96, which it claims is the balance due on a sale and delivery to defendant of 11,675 pounds of sheet zinc at 6-1/2 cents per pound. By way of recoupment defendant pleaded that the plaintiff agreed to sell it 40,000 pounds of sheet zinc; that plaintiff delivered only 11,675 pounds, and that it, defendant, was compelled to purchase the balance in open market at an increase of 1-1/2 cents per pound; and also that defendant was forced to pay \$2.50 and \$1.50 for retaining certain unmarketable lead which plaintiff had shipped to defendant without its knowledge or consent; that \$70.70, which plaintiff pays was paid on account, was in fact paid on an accord and satisfaction.

After hearing all of the evidence relating to the claim of plaintiff and the defense of defendant in support of the allegations in its plea above referred to, the court permitted defendant to file an amended affidavit of verification up that there had been an accord and satisfaction of the contract in dispute between the parties. The case was tried without a jury, and the finding and judgment were in favor of the defendant. The plaintiff brings this case here by appeal for review.

It was orally stipulated upon the trial that the issues were whether the defendant had received less goods than it had ordered and which the plaintiff had agreed to deliver to it, and whether the \$470.70 was paid on account or was in accord and satisfaction of matters in controversy. As to the first of these issues the evidence submitted by plaintiff and defendant, respectively, is in direct conflict. Witnesses testified as to the terms of the contract, and there was evidence heard from which the trial judge, who had an opportunity to hear and observe the witnesses, was authorized to find that the plaintiff agreed to deliver the 40,000 pounds of material, as alleged by the defendant.

It is evident that the trial court was convinced that the plaintiff must be held to have entered into an accord and satisfaction of the matter in dispute, and this brings us to a consideration of what seems to be the principal question in the case.

The contract involved was entered into on the 28th day of January, 1915. On February 24th, 1915, the defendant wrote the plaintiff as follows:

"We are enclosing herewith our check for \$470.70 in payment of 11,675# of Zinc Sheet which you shipped us on our order of 40,000# which you took at 6-7/8¢ per pound.

"We have deducted \$318.66 amount of loss we sustained on account of your not filling order as agreed, there being an increase in the price of zinc of 1-1/8¢ per pound between the time you took the order and the time we learned you would not fill the order as taken; we are also deducting \$2.80 for unloading and loading Antimonial Lead which we did not order and could not use, also freight charges of \$10.50 on shipment.

"We are enclosing statement covering the transaction, and believe you will find check correct."

It appears that before this letter was written the defendant, on February 8th and again on February 11th, had demanded in writing of the plaintiff that it comply with the terms of the contract for the delivery of 40,000 pounds of zinc sheets. It stated in the letter of February 8th, "We

It was orally stipulated that the trial should be  
taken into consideration the defendant had received less goods  
than it had ordered and which the plaintiff had agreed to  
deliver to it, and whether the \$470.70 was paid on account  
of the goods and what other of matters in controversy.  
As to the first of these issues the evidence submitted by  
plaintiff and defendant, respectively, is in direct conflict.  
Witnesses testified as to the terms of the contract, and there  
was evidence heard from which the trial judge, who had an  
opportunity to hear and observe the witnesses, was authorized  
to find that the plaintiff agreed to deliver the 40,000  
pounds of material, as alleged by the defendant.  
It is evident that the trial court was convinced  
that the plaintiff must be held to have entered into an agreement  
and satisfaction of the matter in dispute, and this brings  
us to a consideration of what seems to be the principal  
question in the case.  
The contract involved was entered into on the 15th  
day of January, 1910. On February 24th, 1911, the defendant  
wrote the plaintiff as follows:  
"We are enclosing herewith our check for \$470.70  
in payment of 11,675 of the goods which you shipped us  
on our order of 40,000 which you took at \$-7/16 per pound.  
"We have deducted \$118.68 amount of loss we sustained  
on account of your not filling order as agreed, there  
being an increase in the price of 1-1/4 per  
pound between the time you took the order and the time we  
learned you would not fill the order as agreed; we are  
also deducting \$2.00 for unloading and loading material  
and when we did not order and could not use, also freight  
charges of \$10.00 on shipment."  
"We are enclosing statement covering the transaction  
and believe you will find check correct."  
It appears that before this letter was written the  
defendant, on February 24th and again on February 15th, had  
admitted in writing to the plaintiff that it bought with the  
terms of the contract for the delivery of 40,000 pounds of  
the goods. It stated in the letter of February 24th, "We



stand by our original order and will expect you to fill it just as we have gave it to you." The February 11th letter stated, "We will expect a reply by return mail stating whether or not you will deliver the balance of the zinc sheets at the price agreed upon in our telephone conversation and confirmed by our order to you \* \* . Failing to get the balance of these zinc sheets or failing to hear from you by return mail, we shall buy zinc in the market and expect you to make up the difference between the contract price of 6-7/8¢ delivered, and the then market price of zinc." In these letters the defendant also referred to the unauthorized shipment to it of the antimonial lead heretofore mentioned.

On February 10th plaintiff wrote the defendant, but did not in any direct manner meet the complaint of the defendant as to plaintiff's failure to deliver the material contracted for. A part of this letter is as follows:

"We have in stock 300 to 400 plates of spelter made out of scrap sheet zinc. If you are in urgent need of same we can deliver you same at 8¢ per pound delivered Waukegan, Illinois. You will please notice that we are not selling you a full car but simply what we have on hand 10 to 15 tons. This can be loaded immediately upon receipt of your order providing we hear from you not later than tomorrow."

On February 12th the plaintiff wrote the defendant again as follows:

"We are today in receipt of a letter signed J.H. Broad and as the writer is an old man in his line, and Mr. Broad's statement, as to 'charging our account' is certainly not becoming even for your trying it, and in the future, if there is any correspondence coming from your concern, please let it be direct from yourself, and if there should be so much dissatisfaction you had better return us the antimonial lead, get a car and load it up and send it back to us. Now, Mr. Arthur, when I was over to your place of business last, I understood we covered the ground thoroughly."

We are inclined to the view that the trial court was correct in its finding that the acceptance by the plaintiff of the \$470.70 which was mailed to it by defendant on



stand by our original order and will expect you to fill it  
just as we have given it to you. The quantity of the  
order, "We will expect a reply by return mail stating whether  
or not you will deliver the balance of the same amount at the  
price agreed upon in our telephone conversation and confirmation  
of our order to you \* \* . Waiting to get the balance of  
these two orders or failing to hear from you by return mail,  
we shall not wait in the market and expect you to make up the  
difference between the contract price of 5-1/2% delivered, and  
the then market price of 4-1/2%." In these letters the defendant  
also referred to the unauthorized shipment to it of the  
unauthorized bond hereinafter mentioned.

On February 10th Plaintiff wrote the defendant, but  
it is not in any way a counter most the complaint of the  
defendant as to Plaintiff's failure to deliver the material  
contracted for. A part of this letter is as follows:  
"We have in stock 300 to 400 plates of another  
kind of very sheet zinc. If you are in urgent need  
of some we can deliver you some of 30 or 40 tons delivered  
Chicago, Illinois. You will give us notice that we are  
not selling you a full ton but only what we have on hand  
in 10 lb tons. This can be loaded immediately upon re-  
ceipt of your order providing we hear from you not later  
than tomorrow."

On February 12th the Plaintiff wrote the defendant  
again as follows:

"We are today in receipt of a letter dated 11.  
From Mr. J. H. Miller in an old man in his line, and  
Brook's statement, as to 'Chicago our account' is cer-  
tainly not correct. When you signed it, and in the  
future, if there is any correspondence coming from  
Chicago, please let it be direct from Chicago, and if  
there should be no such direct action you had better re-  
turn us the material in 10 lb tons and have it up and  
send it back to us. Now, Mr. Miller, when I was over to  
your place at Chicago last, I happened to be covered the  
ground thoroughly."

We are inclined to the view that the trial court  
was correct in its finding that the defendant by the plain-  
tiff of \$470.75 which was added to it by defendant on

February 24, 1915, accompanied by the letter of that date which specifically informed the plaintiff that the \$470.70 was in full settlement of any sum due the plaintiff from defendant.

In its contention that no accord and satisfaction was had between the parties, plaintiff relies solely upon the case of Teague v. John E. Burns Lumber Co., 187 Ill. App. 225. In that case it was held that where there is a bona fide dispute between a debtor and creditor as to a portion of a claim made by the creditor, and the debtor sends to the creditor payment of the sum he admits to be due, with the express or implied condition that it is to be accepted as payment in full or returned, there is an accord and satisfaction if the creditor retains it, and the creditor cannot thereafter recover the balance he claims to be due. The decision of the above case does not, in our opinion, aid the contention of counsel for plaintiff, for the reason that on this record it is apparent that there was an actual dispute between the parties as to the terms of the contract which they had entered into, and as to whether the defendant had been damaged by the alleged failure of the plaintiff to perform its part of the contract. It is shown by the evidence in the record that the defendant accepted an offer on the part of the plaintiff to sell it the material in question, on the express understanding that plaintiff was to deliver to defendant 40,000 pounds of such material. Plaintiff in fact delivered to defendant only 11,675 pounds of this material, and thereafter attempted to collect the contract price for the amount so delivered. A real dispute then arose between the parties as to the terms of the contract. As seen, the letter of February 24, 1915, above quoted, was delivered to plaintiff with an accompanying check, which check plaintiff received and appropriated to

and in full settlement of my debt to the Plaintiff from the date specified herein.

check, which check plaintiff received and appropriated to  
above stated, was delivered to plaintiff with an accompanying  
of the contract. As soon, the latter of February 24, 1916,  
real dispute then arose between the parties as to the terms  
collect the amount of price for the amount so delivered. A  
11,775 pounds of this material, and thereafter plaintiff  
material. Plaintiff in fact delivered to defendant only  
plaintiff was to deliver to defendant 40,500 pounds of such  
the material in question, or the express understanding that  
accepted an offer on the part of the plaintiff to sell it  
it is shown by the evidence in the record that the defendant  
failure of the plaintiff to perform its part of the contract.  
to whether the defendant had been damaged by the alleged  
the terms of the contract which had entered into, and as  
that there was an actual dispute between the parties as to  
plaintiff, for the reason that on this record it is apparent  
does not, in the opinion, and the contention of counsel for  
balance he failed to be due. The relation of the above case  
relation it, and the creditor cannot thereafter recover the  
or returned, there is no record and a finding if the creditor  
implied condition that it is to be accepted as payment in full  
payment of the same he fails to be due, with the express or  
made by the creditor, and the creditor sends to the creditor  
pute between a debtor and creditor as to a portion of a claim  
In that case it was held that where there is a bona fide dis-  
case of Tasane v. John E. Tard (187 Ill. App. 105, 106).  
was had between the parties, plaintiff's relief solely upon the  
In its contention that no record and a finding



its own use. Under the decisions of this state it must be held that such conduct on the part of plaintiff operated as an accord and satisfaction of its claims against the defendant. Lapp v. Smith, 183 Ill. 179; Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244. "If the debt or claim is disputed or contingent at the time of payment, the payment, when accepted, of a part of the whole debt, is a good satisfaction." 1 Am. & Engl. Ency. Law, 2nd ed., 419.

The correspondence between the parties, shown by the record, when examined, is indicative of the desire and willingness of the defendant to comply with its part of the agreement, and we are of opinion that the defendant was justified in deducting the amount of the loss it sustained by reason of the failure of the plaintiff to perform its part of the contract.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



its own use. Under the heading of this case it was in  
this that such contract on the part of plaintiff, executed as

an order and satisfaction of its claim against the

defendant. Long v. Smith, 187 Ill. 179; Carson Union Coal

Co. v. Valley Gravel Co., 111 Ill. 244. The fact on

claim is disputed or contingent at the time of payment, the

payment, when accepted, of a part of the whole debt, is a

partial satisfaction. 1 Am. & Eng. Ency. Law, 2nd ed., 410.

The correspondence between the parties, shown by

the record, when examined, is indicative of the fact that

the defendant of the defendant to comply with the terms of the

agreement, and we are of opinion that the defendant was

justified in deducting the amount of the taxes it sustained by

reason of the failure of the plaintiff to perform its part

of the contract.

The judgment of the Circuit Court is affirmed.

Reversed.

JOSEPH ELIA,  
Appellant,

vs.

FRANK BAVUSO and  
VINCENZO GUGLIELMO,  
Appellees.

APPEAL FROM COUNTY COURT,  
COOK COUNTY.

204 I.A. 314

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an action at law in the County Court, brought by plaintiff against the defendants upon a contractor's building bond. Plaintiff and the defendant Frank Bavuso entered into a contract for the construction of a building by Bavuso for plaintiff. Bavuso under the contract was to furnish all materials and to complete the building in accordance with certain plans and specifications. The contract provided that in case Bavuso failed to complete the building on or before September 2, 1912, he was to forfeit two dollars per day for the period of time taken to complete the building after that date. The contract also provided that in the event of any dispute arising during the course of the work the matter in dispute was to be referred to a board of arbitrators to be appointed as provided for in the contract. In an amended declaration filed by plaintiff it was alleged that the defendant as principal, and Vincenzo Guglielmo as surety executed and delivered to the plaintiff a bond which secured a proper performance of the contract in question.

Plaintiff alleged in his declaration that the defendant had failed to comply with the substantial requirements of the contract. The defendant filed to the declaration the plea of nil debit, and also three additional pleas as fol-

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lows: (1) that no arbitrators were appointed and that no award was made, and that the matters in controversy were not submitted to the architects in accordance with the terms of the contract; (2) that no indebtedness was due plaintiff but that the plaintiff was indebted to the defendant Ravuso in the sum of \$1,000 for the work done upon and the material furnished in the building; and (3) that the contract was so modified as after the bond was given by defendant as to render such bond void. A demurrer was filed by plaintiff to all the pleas except the plea of nil debit; the demurrer was overruled as to the first and third additional pleas, and it was sustained as to the second additional plea. The defendant later filed a plea of set-off. Trial was had before a jury, which rendered a verdict in favor of Ravuso on his plea of set-off for the sum of \$150. Judgment was entered on the verdict, and the plaintiff brings the case to this court by appeal.

Complaint is made of the action of the trial court in refusing to give certain instructions to the jury. We are unable to determine from the abstract of record filed by counsel for plaintiff whether, under the evidence heard at the trial, the instructions referred to were properly refused or not. The bill of exceptions, which has been made a part of the record, is not abstracted, and the abstract does not show what evidence was heard on the trial. One of these instructions recites in part, "that if you believe from the evidence that Ravuso did not well and truly perform and fulfill all the covenants and agreements \* \* and did not comply with the plans and specifications, then you must find the issues for plaintiff," etc. We have no means of knowing what the evidence was in this connection; hence we cannot say whether the instruction was or was not properly refused.

It is also urged that the court erred in over-



[illegible]

ruling the demurrer to the plea which alleged that the parties had not submitted the cause of action to arbitration as provided in the contract. Plaintiff did not stand by his demurrer; he elected to reply to the plea of no arbitration, and we cannot, therefore, insist here that this action of the court was error.

It is also urged that in an action of debt there can be no such thing as a judgment in favor of one defendant on a recoupment or set-off where there are more than one defendant. There is no merit in this contention. In Marcy v. Whallon, 115 Ill. App. 435, it was held that a surety may interpose by way of defense to an action against him a demand due from the plaintiff to the principal defendant in the action. "While it is a general rule that in order that a set-off may be applied there must be mutual and connected demands between the same parties and in the same right, yet suits against principal and surety furnish an exception to the rule." It was held in Hiarod v. Baugh, 85 Ill. 435, that in a suit against a principal and his sureties the defendants may plead as a set-off a demand due from the plaintiff to the principal defendant.

The judgment of the County Court is affirmed.

AFFIRMED.



OVERLAND MOTOR COMPANY,  
a corporation,

Appellee,

vs.

W. C. FOSTER,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 315

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

In an affidavit of claim filed in the Municipal Court the plaintiff alleged that the defendant was indebted to it in the sum of \$14.61 for goods, wares and merchandise sold and delivered to the defendant and also for labor done and performed by plaintiff for the defendant at his special instance and request. The defendant was served with summons, and on the return day thereof a judgment was entered against him for the above named amount. On the following day, May 4, 1916, a motion was made by defendant to vacate this judgment; on May 5th the motion was allowed. The cause was set for trial on May 8th, on which date the defendant moved the court for a continuance, which motion was overruled and a finding and judgment entered against the defendant in the sum of \$14.61.

Counsel for defendant insist that the trial judge committed error in overruling the motion for continuance of the cause; that the affidavit which was filed in support of the motion showed that counsel for defendant was on May 8th actually engaged in the trial of a cause in another court, and that under the rules of the Municipal Court the defendant was entitled as a matter of right to a continuance of the case.

If it be assumed that counsel for defendant are right in their contention, no advantage may be taken by the defendant



OVERLAND MOTOR COMPANY,  
 a corporation,  
 Appellee,  
 vs.  
 W. C. FOSTER,  
 Appellant.

ALABAMA STATE SUPREME COURT  
 OF CHICAGO.

2041 A. 815

THE JUSTICE DEPARTMENT DELIVERED THE DECISION OF THE COURT.

In an affidavit of claim filed in the Municipal Court the plaintiff alleged that the defendant was indebted to it in the sum of \$1,61 for goods, wares and merchandise sold and delivered to the defendant and also for labor done and performed by plaintiff for the defendant at his special instance and request. The defendant was served with summons, and on the return day thereof a judgment was entered against him for the above named amount. On the following day, May 4, 1910, a motion was made by defendant to vacate this judgment; on May 5th the motion was allowed. The case was set for trial on May 8th, on which date the defendant moved the court for a continuance, which motion was overruled and a finding and judgment entered against the defendant in the sum of \$1,61.

Counsel for defendant insist that the trial judge committed error in overruling the motion for continuance of the case; that the affidavit which was filed in support of the motion showed that counsel for defendant was on May 8th actually engaged in the trial of a case in another court, and that under the rules of the Municipal Court the defendant was entitled as a matter of right to a continuance of the case. It is assumed that counsel for defendant are right in their contention, no advantage may be taken by the defendant

of this error in this court, for the reason that neither the abstract of the record filed herein, nor the bill of exceptions which has been made part of the record, contains any proof of the existence of the rules upon which counsel rely. This court will not take judicial notice of the rules of the Municipal Court of Chicago. Sixby v. Chicago City Ry. Co., 260 Ill. 478.

It is also urged that the statement of claim filed by plaintiff did not state a cause of action. Questioned as it is for the first time in this court, we are of opinion that the statement of claim filed by plaintiff is sufficient to sustain the judgment of the trial court.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

at this stage in this court. For the reason that neither the  
- statement of the record nor the bill of costs  
- time will be made part of the record, and in any  
- event of the statement of the rules upon which the  
- this court will not take judicial notice of the rules of the  
- American Court of Ontario. Ex parte v. American City Co.  
- 220 Ill. 404.

It is also urged that the statement of claim  
- filed by plaintiff did not state a cause of action. That  
- statement is in the first place in this court, and the  
- opinion that the statement of claim filed by plaintiff is  
- sufficient to sustain the judgment of the trial court.  
- The judgment of the trial court is affirmed.

REVEREND.

AUGUST BEHRNS, Admr. of the  
Estate of Edward Behrns, Decd.,  
Appellee,

vs.

ADOLPH W. ROTH,

Appellant.

APPEAL FROM

SUPERIOR COURT,  
COOK COUNTY.

204 I.A. 328

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, as administrator of the estate of Edward Behrns, deceased, brought suit in the Superior Court against the defendant, Adolph W. Roth, charging in the declaration, consisting of two counts, that the defendant was legally responsible for the death of plaintiff's intestate. The first count charges that the defendant on the 4th day of August, 1914, was the proprietor and manager of a natatorium, located at No. 1238 Milwaukee avenue, Chicago; that it was the duty of defendant to furnish competent help, safety appliances and employees to safeguard the lives of patrons of the natatorium; that the deceased, Edward Behrns, on said date had visited the natatorium and, after swimming and playing about there for an hour and a half, was drowned, by and in consequence of "the neglect, lack of safety appliances, carelessness and lack of diligence of the said defendant and the guards at said natatorium." The second count charges that the deceased met his death "by the wrongful act, neglect, lack of safety appliances and default of said defendant, his servants, employees," etc.

On the trial the jury returned a verdict in favor of the plaintiff for the sum of \$500. Judgment was entered on this verdict, and the defendant brings the case here by appeal for



AUGUST 1914, Adm. of the  
 Estate of Edward Behrens, Decd.,  
 Appellee,  
 vs.  
 ADOLPH W. ROTH,  
 Appellant.  
 SUPERIOR COURT,  
 COOK COUNTY.  
 APPEAL FROM

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 ances and default of said defendant, his servants, employees,"  
 etc.

On the trial the jury returned a verdict in favor of  
 the plaintiff for the sum of \$500. Judgment was entered on this  
 verdict, and the defendant brings the case here by appeal for

a reversal of this judgment.

Two main reasons are urged by the defendant why the judgment of the trial court should be reversed: first, that there was no evidence introduced or admitted on the trial from which it may reasonably be determined that the death of plaintiff's intestate was caused by drowning; second, that whatever may be said as to the cause of such death, there is no evidence in this record from which it may fairly be concluded that the death of plaintiff's intestate was the result of any negligence on the part of the defendant or his employees.

It appears from the evidence taken at the trial that the deceased, at the time he met his death, was 15 years and 11 months old; that on the day in question he and a boy companion visited the natatorium of the defendant; that he spent about an hour before his death swimming and playing about in the tank with some 35 other boys. The defendant had two guards at the tank at the time in question, one of whom was about 17 years of age, and the other was a mature man. The tank was 120 feet long and 30 feet wide, and "the water runs in depth from  $2\frac{1}{2}$  feet to 10 feet on the slope." The water was heated by steam and was filtered before passing into the tank for use. An iron railing extended around the tank, about  $3\frac{1}{2}$  or 4 feet high; the sides of the tank were of white enameled cement. The depth of the water at various places in the tank was indicated by signs, and other signs contained warnings and cautions to persons using the tank, such as "Safety First," and "Look Before You Dive." Ropes extended across the tank, from which were suspended other ropes situated about a foot or a foot and a half apart, and extending downward towards the surface of the water in the tank. These ropes were for the use

a reversal of this statement.

Two main theories are urged by the defendant and the judgment of the trial court should be reversed: First, that there was no evidence introduced or admitted on the trial from which it may reasonably be determined that the death of plaintiff's intestate was caused by drowning; second, that whatever may be said as to the cause of such death, there is no evidence in this record from which it may fairly be concluded that the death of plaintiff's intestate was the result of any negligence on the part of the defendant or his employees.

It appears from the evidence taken at the trial that the deceased, at the time he got his death, was 15 years and 11 months old; that on the day in question he and a boy named Benton visited the waterpark of the defendant; that he went about an hour before his death swimming and playing about in the tank with some 25 other boys. The defendant had two guards at the tank at the time in question, one of whom was about 14 years of age, and the other was a mature man. The tank was 120 feet long and 30 feet wide, and "the water was 10 feet from 2 feet to 10 feet on the slope." The water was heated by steam and was filtered before passing into the tank for use. An iron railing extended around the tank, about 3 feet or 4 feet high; the sides of the tank were of white cement. The depth of the water at various places in the tank was indicated by signs, and water at no containing warning was caused to pass over the tank, such as "Beware of Water," and "Look Before You Dive." Ropes extended across the tank, from which were suspended other ropes attached about a foot or a foot and a half apart, and extending downward towards the surface of the water in the tank. These ropes were for the use



of" customers who are exhausted, to hold to or to climb part way up and bob up and down and amuse themselves."

The deceased was last seen alive holding on to one of these ropes; he was seen to release his hold of the rope and sink in the tank. One of the boys watching him noticed that he came up again to the surface of the water but did not seem to "break the water"; he then disappeared again. The boy who had been watching deceased immediately informed the guard that "his friend went down and did not come up." This boy pointed out the place where deceased had sunk in the water, and the guard dived into the water and found deceased and brought him out of the tank. This guard had been in the employ of defendant for six years and was a licensed life saver. Deceased was placed upon the floor near the tank and the guard used his best efforts to resuscitate him; he placed his hands on deceased's stomach and pressed up, deceased lying face downward. The guard testified that a few drops of water may have issued from the mouth of deceased. Within five or six minutes after deceased had been taken from the tank a pulmotor arrived, as also a doctor, and every reasonable effort was made to restore him to life.

The evidence is clear that at the time deceased let go of his hold on the rope he made no outcry or struggle of any sort. There is some evidence to the effect that the guard had a newspaper in his hand at the time his attention was called to deceased. He testified that he had the newspaper folded up and was using it "slapping flies." Another witness, however, testified that the guard was reading the newspaper at the time deceased sank in the water. There was much noise in the natatorium at the time in question; the boys were jumping and diving in the water, and it was difficult to hear anything that might be said by anyone at the time.



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at the time in question; the boys were jumping and diving in the  
water. It is difficult to hear anything that might be said  
by any of the time.

One witness testified that there was some froth around the mouth and nose of the deceased after his body had been taken from the water, and another witness testified that a small quantity of water came from his mouth as the men were working upon him to restore him.

Frank Bona, who went to the natatorium with deceased, testified: "We were swimming in the shallow water for a while, then he swam across the tank across the shallow water. Then after a while he went in the ten-foot water and dived by the pipes near the spring-board. Then he said, 'let's try to go across the ropes once.' He went about two times, and said, 'it is some work.' After he got up he was trying to go a third time and was hanging on the ropes. Then he let go and I thought he was fooling, so I didn't say anything because I thought we would not get our swim if I told a lie to the life-saver. He came up once and came up for the second time, and I went to a boy, a man, and I told him and he didn't say anything. I told some boys, I told Speik, but they were swimming in the shallow water, so me and another boy, I don't know, ran to get someone. He ran up to the life-saver, and I found a life-saver sitting on the railing reading a newspaper. He had white pants on. It was right by the spring-board near the end of the tank. I said there was a boy drowning. He dived once and didn't get him, and the second time he dived he got him up. They laid him on his belly and started rubbing his back. \* \* He didn't cry out or make any noise."

There was introduced in evidence the verdict of the coroner's jury, which recited that deceased's death was caused by drowning. Dr. Reinhardt, coroner's physician, testifying on behalf of defendant, said that he made a post mortem on the body of Edward Behrns about 18 or 20 hours after his death; that he found no external marks of violence or injury;

One witness testified that there was some tooth around the mouth and nose of the deceased after his body had been taken from the water, and another witness testified that a small quantity of water came from the mouth as the man was working upon him to restore him.

Frank Bona, who went to the natatorium with deceased, testified: "We were swimming in the shallow water for a while, then he swam across the tank across the shallow water. Then after a while he went in the ten-foot water and dived by the pipes near the spring-board. Then he said, 'Let's try to go across the ropes once.' He went about two times, and said, 'It is some work.' After he got up he was trying to go a third time and was hanging on the ropes. Then he let go and I thought he was fooling, so I didn't say anything because I thought we would not get our swim if I told a lie to the life-saver. He came up once and came up for the second time, and I went to a boy, a man, and I told him and he didn't say anything. I told some boys, I told Speik, but they were swimming in the shallow water, so we and another boy, I don't know, ran to get someone. He ran up to the life-saver, and I found a life-saver sitting on the railing reading a newspaper. He had white pants on. It was right by the spring-board near the end of the tank. I said there was a boy drowning. He dived once and didn't get him, and the second time he dived he got him up. They laid him on his belly and started rubbing his back. He didn't cry out or make any noise."

There was introduced in evidence the verdict of the coroner's jury, which recited that deceased's death was caused by drowning. Dr. Reinhardt, coroner's physician, testifying on behalf of defendant, said that he made a post mortem on the body of Edward Bona about 18 or 20 hours after his death; that he found no external marks of violence or injury;



that he opened up the body and found the presence of a thymus gland in the lower part of the neck or upper part of the chest, extending down and covering about two-thirds of the right side of the heart; that he found the bronchial glands enlarged and hardened, and that the lungs were inflated; that there was no water in the lungs, chest cavity or bronchial tubes; that there was no disease of the heart; that the spleen was enlarged to three times its normal size; that the mesentery glands, which normally could not be felt, were enlarged and hardened; that the glandular structures in the intestines and lymphatics were enlarged three or four times their normal size, and that there was no water in the stomach. The witness stated that the Thymus gland is a gland which is supposed to be of great importance early in life and disappears between the ages of two to ten or twelve years; that where it does not disappear it causes an intoxication of the blood, and frequently causes sudden death. He further testified that in the large majority of drowning cases the lungs contain water; that where there is water in the lungs that has been removed by manipulation or the use of a pulmotor the water leaves indications of having been there; that he found no such indications in the case of the deceased; that persons in the same physical condition described by the witness are liable to die suddenly when swimming in the water; that it is a common cause for sudden death, and that in many instances "these particular cases" are found dead in bed without any apparent shock or injury. The witness testified that in his opinion deceased's death was caused by what he denominated status lymphaticus or obstruction of the lymph flow.

Another doctor, testifying for the defendant, in answer to a hypothetical question stated that in his opinion the death was not caused by drowning.



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Another doctor, testifying for the defendant, in answer to a hypothetical question stated that in his opinion the death was not caused by drowning.

On an examination of all of the evidence in this record we are of the opinion that the judgment of the trial court should be reversed. Taken as a whole, the evidence does not tend to prove that the deceased came to his death by drowning. Apart from the verdict of the coroner's jury, the evidence is clear that death was brought about by causes other than drowning. There was no evidence admitted tending in any way to contradict the testimony of Dr. Reinhardt, and from this testimony it abundantly appears that the deceased was afflicted with serious organic disease at and for some time before the date of his death. No evidence was offered in contradiction of what either Dr. Reinhardt or Dr. Hall, defendant's other expert witness, had testified to, and if we accept their testimony as true, it necessarily follows that our conclusion must be that plaintiff's intestate did not die as a result of drowning.

However, it is our opinion that a recovery cannot be had in this case, whatever may be said as to the cause of death, for the reason that on the whole record it is not shown that the defendant or his servants or employees were in any way guilty of negligence which contributed to the death of plaintiff's intestate. One of the reasons urged by counsel for plaintiff why the defendant should be charged with negligence, is that there was much noise and shouting going on just before and at the time deceased met his death. We do not think there is any merit in this contention. Common experience would teach us that the presence of 35 boys swimming in a natatorium such as that operated by defendant would necessarily be accompanied by much confusion and noise, and we do not think that even if it be conceded that there was the confusion and noise complained of at the time of this occurrence, it could

On an examination of all of the evidence in this record we are of the opinion that the judgment of the trial court should be reversed. Taken as a whole, the evidence does not tend to prove that the deceased came to his death by drowning. Apart from the verdict of the coroner's jury, the evidence is clear that death was brought about by causes other than drowning. There was no evidence admitted tending in any way to contradict the testimony of Dr. Reinhardt, and from this testimony it abundantly appears that the deceased was afflicted with serious organic disease at and for some time before the date of his death. No evidence was offered in contradiction of what either Dr. Reinhardt or Dr. Hall, defendant's other expert witness, had testified to, and if we accept their testimony as true, it necessarily follows that our conclusion must be that plaintiff's intestate did not die as a result of drowning.

However, it is our opinion that a recovery cannot be had in this case, whatever may be said as to the cause of death, for the reason that on the whole record it is not shown that the defendant or his servants or employees were in any way guilty of negligence which contributed to the death of plaintiff's intestate. One of the reasons urged by counsel for plaintiff why the defendant should be charged with negligence, is that there was much noise and shouting going on just before and at the time deceased met his death. We do not think there is any merit in this contention. Common experience would teach us that the presence of 25 boys swimming in a natatorium such as that operated by defendant would necessarily be accompanied by much confusion and noise, and we do not think that even if it be conceded that there was the confusion and noise complained of at the time of this occurrence, it could



in any sense be charged to the negligence of the defendant.

It is also claimed that there was an insufficient number of guards employed by the defendant in his natatorium at the time in question. Deceased's boy friend who was with him in the tank had not become apprised of any serious accident to deceased until he had come to the surface of the water the second or third time. We do not think that under the circumstances attending the death of deceased the presence of more guards in or about the tank would have been of the slightest aid or protection to him.

It is also said that insufficient safety appliances and apparatus were furnished by defendant. The evidence does not disclose any defects or insufficiencies in the appliances used by the defendant, nor does it disclose what other appliances or devices could have been used by him that would have afforded a greater protection to persons using the natatorium. It is true that the ropes which extended downward and over the tank did not reach the surface of the water, but it is beyond question, under the circumstances shown in the evidence, that even if they had done so they would have afforded no aid to the deceased.

It cannot be said from the evidence that the guards who were present at the time in question were guilty of any act of negligence. There is some evidence to the effect that the guard who brought deceased's body out of the tank was reading a newspaper at the time his attention was called to the deceased, but the greater weight of the evidence is to the effect that he was carrying this paper in his hand about the tank, and that he was not reading it at and just before the time his attention was called to the deceased. Nor do we think there is any merit in the contention that the defendant was negligent in not using prompt efforts to resuscitate the deceased after his body had



in any sense be charged to the negligence of the defendant.

It is also claimed that there was an insufficient num-

ber of guards employed by the defendant in the water tank at

the time in question. Deceased's boy friend who was with him

in the tank had not become apprised of any serious accident to

deceased until he had come to the surface of the water the second

or third time. We do not think that under the circumstances attend-

ing the death of deceased the presence of more guards in or about

the tank would have been of the slightest aid or protection to him.

It is also said that insufficient safety appliances

and apparatus were furnished by defendant. The evidence does

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was carrying this paper in his hand about the tank, and that

he was not reading it at and just before the time his attention

was called to the deceased. Nor do we think there is any merit

in the contention that the defendant was negligent in not making

prompt efforts to resuscitate the deceased after his body had

been taken from the tank. The evidence discloses that the guard worked promptly and energetically upon the body of the deceased; that within five or six minutes after the body had been taken from the tank a pulmotor was applied, but without effect.

In Larkin v. Saltair Beach Co., 3 L.R.A., N.S., it was held that the owner of a public bathing resort may be found to be negligent where he places no signs as to the depth of water, or marks to indicate danger, and keeps no one at hand to aid persons in danger, and takes no steps to aid a person actually in peril until too late to be of any avail.

In Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448, 452, the court said: "Under the authorities we hold that it was the duty of appellant to make reasonable provision to guard against those accidents which common knowledge and experience teach are liable to befall those engaging in the sport which appellant had invited the public to participate in. Tested by this rule it must follow that while the first and fourth counts each stated a cause of action the second and third counts did not state a cause of action which would be good even after a verdict. Each of the last named counts is based solely upon the assumption that it is actionable negligence not to have an experienced or competent swimmer or diver at hand to render aid to those liable to become strangled, etc."

The verdict of the jury was for the sum of \$500. This sum is so small as to be in no sense compensation for the loss sustained by plaintiff by reason of the death of deceased, and it indicates that the jury in returning such a verdict were not guided by any principle of law or justice properly applicable to the facts of the case. If the defendant, through negligent

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The verdict of the jury was for the sum of \$500. This sum is so small as to be in no sense compensation for the loss sustained by plaintiff by reason of the death of deceased, and it indicates that the jury in returning such a verdict were not guided by any principle of law or justice properly applicable to the facts of the case. If the defendant, through negligent



conduct, is liable for the death of this boy, then the amount fixed in the verdict of the jury as compensation for such death must be regarded as wholly inadequate. We are inclined, however, to the view that the verdict was the result of sympathy rather than a consequence of a fair and impartial consideration of the evidence and the law of the case.

The judgment of the Superior Court is reversed.

REVERSED.



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fixed in the verdict of the jury as compensation for such death  
must be regarded as wholly inadequate. We are inclined, however,  
to the view that the verdict was the result of sympathy rather  
than a consequence of a fair and impartial consideration of the  
evidence and the law of the case.

The judgment of the Superior Court is reversed.

REVEREND.

FINDING OF FACT.

The court finds that neither the defendant, Adolph W. Roth, nor his employees or servants, were guilty of any act or acts of negligence which proximately contributed to the death of plaintiff's intestate, Edward Behrns, as charged in plaintiff's declaration.

WINDING UP ESTATE.

The court finds that neither the defendant, Adolph W. Roth, nor his employees or servants, were guilty of any act or acts of negligence which proximately contributed to the death of plaintiff's intestate, Edward Berna, as charged in plaintiff's declaration.

CHARLES A. WAHRER et al., co-  
partners, trading as Wahrer  
Bros.,

Appellants,

vs.

CIRCILIA MOLLOY,

Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

204 I.A. 329

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a judgment of the Municipal Court in favor of defendant. Plaintiff brought suit in replevin for the recovery of a diamond ring of the value of \$250. The evidence taken at the trial tends to prove that the defendant purchased the ring in question from the plaintiff under a contract which provided for the conditional sale of the ring and the payment therefor in installments; also that the title and right to possession of the ring was to remain in plaintiffs until the final payment had been made in accordance with the terms of the contract.

The ring was not recovered under the replevin writ, and by leave of court a statement in trover was filed, to which the defendant pleaded the general issue. The case was tried by ~~in~~ a jury which returned a verdict finding the defendant not guilty; judgment was entered on this verdict. No appearance has been entered here and no brief has been filed on behalf of the defendant.

It is urged by counsel for plaintiffs that the verdict of not guilty was against the weight of the evidence. We are inclined to agree with this contention. There was in reality but one disputed question of fact presented at the trial for determination by the jury, and that was as to the value of the ring which had been sold by plaintiffs to de-



THE PEOPLE of the County of ...  
vs.  
CIRCELLA ROMEO,  
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE COUNTY OF ...

2041A.323

RE. JUDITH HEWES DELIVERED THE DECISION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Municipal Court in favor of defendant. Plaintiff brought suit to recover for the recovery of a diamond ring of the value of \$250. The evidence taken at the trial tends to prove that the defendant purchased the ring in question from the plaintiff under a contract which provided for the conditional sale of the ring and the payment therefor in installments; also that the title and right in possession of the ring was to remain in plaintiff until the final payment had been made in accordance with the terms of the contract. The ring was not recovered under the terms of the contract, and by leave of court a statement is never was filed, to which the defendant pleaded the general issue. The case was tried by a jury which returned a verdict finding the defendant not guilty; judgment was entered on this verdict. No appearance has been entered here and no entry has been filed on behalf of the defendant.

It is urged by counsel for plaintiff that the verdict of not guilty was against the weight of the evidence. We are inclined to agree with this contention. There was in reality but one disputed question at issue presented at the trial for determination by the jury, and that was as to the value of the ring which had been sold by plaintiff to the

defendant. Plaintiffs proved the contract with defendant and their title and right to the possession of the ring until it had been fully paid for. The purchase price of the ring was \$250, and a properly qualified witness for plaintiffs testified that the market value of the ring at the time it was sold to defendant was \$250. The evidence discloses that defendant had paid \$50 on account of her contract with the plaintiffs, and she sought to prove at the trial that the ring was not worth the \$250 which the evidence shows she agreed to pay for it. The only evidence submitted by defendant on the trial in support of her claim that the ~~ring~~ ring was worth less than the contract price was her own testimony, which is as follows:

"Q. Tell me what you said to him. A. I told him what the stone was worth and asked him to take something off, and that I was willing to pay, and he said the stone was worth \$250.

Q. What did you tell him it was worth? A. I told him it was worth \$165 to \$175.

Q? Did he ask you who tested it? A. Yes, and I wouldn't tell him. \*\* I refused to make further payments because they wouldn't return my money and I didn't think the ring was worth \$250."

This testimony was objected to and motion was made to strike it out. The court overruled the objection and denied the motion. We are inclined to believe that this was error. There was no evidence whatsoever offered or submitted tending to show that the defendant-witness was in any way qualified to testify on the subject of the value of the ring. The value of property such as the diamond ring in question is peculiarly a matter of expert knowledge, and the testimony of an unqualified and inexperienced witness is not admissible to prove such value.

As the testimony above quoted seems to be practically all of the evidence upon which the defendant relied for

which is as follows:

"I tell me what you said to him. A. I told him that those was worth and said to him something off, and that I was willing to pay, and he said the same was worth \$500."

I A. Follow saw it said you tell him it was wrong.

think the ship was worth \$250. I would not tell him. I refused to make further pay-  
ment because they did not return my money and I did not  
want to ask you who tested it? A test, and

an unqualified and implicit witness is not admissible to prove peculiarly a matter of expert knowledge, and the testimony of the value of property such as the diamond ring in question is qualified to testify on the subject of the value of the ring. Tendency to show that the defendant-witness was in any way error. There was no evidence whatsoever offered or submitted tending the action. On the finding to believe that this was made by strike it out. The court overruled the objection and this testimony was objected to and excluded.

As the testimony was quoted above to be true -

a verdict and judgment in her favor, and as it is obvious that it was error to admit such testimony, the judgment of the Municipal Court must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.



a verdict and judgment in her favor, and as it is evident  
that it was error to admit such testimony, the judgment  
of the Municipal Court must be reversed and the cause re-

manded for a new trial.

REVEREND AND HONORABLE,

THE COURT OF APPEALS, NEW YORK.

IN SENATE, JANUARY 10, 1906.

REPORT OF THE COURT OF APPEALS, NEW YORK.

IN SENATE, JANUARY 10, 1906.

REPORT OF THE COURT OF APPEALS, NEW YORK.

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REPORT OF THE COURT OF APPEALS, NEW YORK.

IN SENATE, JANUARY 10, 1906.

417 - 21815.

THE UNIVERSITY CLUB OF  
CHICAGO, a corporation,  
Appellant,

vs.

EARL H. DEAKIN,  
Appellee.

204 I.A. 334

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action for rent under a written lease in which the club was the lessor and Deakin the lessee. The case has been in this court before and is reported in abstract form in 182 Ill. App. 484. It went from this court for further review to the Supreme Court, whose decision is to be found in 265 Ill. 257. For a statement of the case and the questions involved we refer to the reported cases supra.

The twelfth clause of the lease is the bone of contention. It reads, "Lessor hereby agrees during the term of this lease not to rent any other store in said University Club Building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls." This covenant the Supreme Court held was binding and in effect meant what it said. In violation of this covenant, defendant claims, plaintiff rented another store in its building to one Sandberg, a jeweler who made a specialty of the sale of pearls, etc. Whether he did so or not is a question of fact, which the Supreme Court sent to the trial court for determination. The court found against the plaintiff on this proposition.

If the evidence sustains the finding, then the

2041A.284

APPEAL FROM  
CIRCUIT COURT  
OF CHICAGO.

THE UNIVERSITY CLUB OF  
CHICAGO, a corporation,  
Appellant,

v.

EARL R. DEAN,  
Appellee.

MR. JUSTICE HODON FURNISHED THE OPINION OF THE COURT.

This is an action for rent under a written lease in which the club was the lessor and Dean the lessee. The case has been in this court before and is reported in 484 Ill. App. 484. It went from this court for further review to the Supreme Court, whose decision is so found in 363 Ill. 251. For a statement of the case and the questions involved we refer to the

reported cases above.

The twelfth clause of the lease is the bone of contention. It reads, "Lessor hereby agrees during the term of this lease not to rent any other store in said University Club Building to any tenant making a specialty of the sale of Japanese or Chinese goods or wares." In effect the Supreme Court held was binding and in effect meant what it said. In violation of this covenant, defendant claimed, plaintiff rented another store in the building to one Rosenberg, a Jeweler who made a specialty of the sale of jewelry, etc. Whether he did so or not is a question of fact, which the Supreme Court says is for the court for determination. The court found against the plaintiff on this proposition.

IT was ordered reversing the finding, and the

2.

judgment is right. On this point the Supreme Court said:

"The court was not asked to make any finding of fact, and there is nothing in the record to indicate that the judgment is based upon any finding of fact. Whether Sandberg had, in fact, made a specialty of the sale of pearls was one of the controverted questions in the case. One of the propositions submitted by defendant in error and held by the court, stated that the conduct of a general jewelry business was not 'making a specialty of the sale of pearls,' within the meaning of the words quoted as they were used in the twelfth clause of plaintiff in error's lease. This cannot be construed as a holding that Sandberg did not, in fact, in addition to his conduct of a general jewelry business, make a specialty of the sale of pearls."

We think the evidence affirmatively establishes the fact that Sandberg did, in the conduct of his general jewelry business, make a specialty of the sale of pearls. The Supreme Court in construing the twelfth clause of the lease said:

"By the terms of its contract with plaintiff in error it agreed that no other portion of its premises should be leased to any one engaged in the prohibited line of business, and if it failed to prevent any subsequent tenant from engaging in the business of making a specialty of the sale of pearls, it did so at the risk of plaintiff in error terminating his lease and surrendering possession of the premises."

The leasing by plaintiff of a store in its building to Sandberg as a rival of defendant in the sale of pearls, was a breach of that covenant, which the court of last resort has held warranted defendant in abandoning possession of his store and surrendering the same to plaintiff and absolved him from the payment of further rent therefor.

As one of the cogent evidences of the fact that Sandberg was making a specialty of the sale of pearls, an advertisement not contradicted is introduced in evidence, which, after showing a cut of a pearl necklace, proceeds:

"A Pearl Necklace

WITH NO DUPLICATE IN EXISTENCE



judgment is right. On this point the Supreme Court said:

"The court was not asked to make any finding of fact, and there is nothing in the record to indicate that the judgment is based upon any finding of fact. The court, in fact, made a specialty of the sale of pearls was one of the controverted questions in the case. One of the propositions submitted by defendant in error and held by the court, was that the contract of a general jewelry business was not 'making a specialty of the sale of pearls,' with- in the meaning of the words quoted as they were used in the twelfth clause of plaintiff's error's lease. This cannot be construed as holding that defendant did not, in fact, in addition to his contract of a general jewelry business, make a specialty of the sale of pearls."

We think the evidence affirmatively establishes the fact that Sandberg did, in the conduct of his general jewelry business, make a specialty of the sale of pearls. The Supreme Court in construing the twelfth clause of the lease said:

"If the terms of its contract with plaintiff in error it agreed that no other portion of its premises should be leased to any one engaged in the prohibited line of business, and it is alleged to prevent any subsequent tenant from engaging in the business of making a specialty of the sale of pearls, it did so at the risk of plaintiff in error forfeiting his lease and surrendering possession of the premises."

The leasing by plaintiff of a store in its building to Sandberg as a rival of defendant in the sale of pearls, was a breach of that covenant, which the court of last resort has held warranted defendant in abandoning possession of his store and surrendering the same to plaintiff and absolved him from the payment of further rent thereon. As one of the cogent evidences of the fact that Sandberg was making a specialty of the sale of pearls, an advertisement not contradicted in introduction in evidence, which, after showing a cut of a pearl necklace, pronounced:

"A Pearl Necklace"

3.

We carry none but the most refined creations of the jeweler's art-designs exclusive, many with no duplicates in this country.

Pearl Necklaces . . . . .	\$400 to \$7,000
Pearl and Diamond Brooches . . . . .	\$ 5 to \$ 200
18 K. Wedding Rings (Seamless latest) . . . . .	\$ 7 to \$ 12
22 K. Wedding Rings (English styles) . . . . .	\$ 8 to \$ 12
Sterling Silver Coffee & Tea Sets . . . . .	\$ 20 to \$ 400
A Complete assortment of Mesh Bags . . . . .	\$.5.50 to \$ 50

Inspection invited. We will send goods for examination anywhere in the United States.

WM. K. SANDBERG & CO.,  
Chicago.

Jewelers.

138 Michigan Ave.  
University Club Building."

From this advertisement it is patent that Sandberg made a specialty of dealing in pearl necklaces and that from a monetary viewpoint the other articles dealt in by him were insignificant and of small moment.

That Sandberg sold pearl necklaces on consignment does not in our judgment affect the situation, for it was immaterial to Deakin in his pearl business whether Sandberg specialized in pearls by sales on consignment or by carrying an assortment of pearls in stock. Whichever method was pursued, the result was the same to Deakin. He had in Sandberg, in the club's building, a competitor and a rival in the sale of pearls. This was a condition which defendant anticipated might occur and sought to escape by the covenant in the twelfth clause of the lease.

We think that the trial court did not err in holding that defendant did not waive any right he may have had

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4.

to object to Sandberg's competition by reason of his failure to vacate promptly, or in holding that it was not necessary for defendant to assign Sandberg's sale of pearls as the reason for vacating the premises.

We think the Supreme Court has settled these questions against plaintiff's contention, and that defendant, because of the breach by plaintiff of the twelfth clause of the lease, had the right to rescind the contract as he did.

The judgment of the Municipal Court is in accord with the decision of the Supreme Court in this case on the law and its finding of fact being sustained by the proofs, its judgment is affirmed.

**AFFIRMED.**



to object to Sandberg's competition on reason of his failure to vacate promptly, or in holding that it was not necessary for defendant to assign Sandberg's sale of pearls as the reason for vacating the premises.

We think the Supreme Court has settled these questions against plaintiff's contention, and that defendant, because of the breach by plaintiff of the twelfth clause of the lease, had the right to rescind the contract as

he did.

The judgment of the Municipal Court is in accord with the decision of the Supreme Court in this case on the law and its finding of fact being sustained by the proofs. The judgment is affirmed.

ATTEST.

FRANK C. DIXON,  
Appellee,

vs.

SMITH-WALLACE SHOE  
COMPANY, a corp.,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

204 I.A. 336

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$3,000 entered upon the verdict of a jury in favor of plaintiff and against defendant, and defendant appeals.

The cause proceeded to trial on an amended declaration and the plea of the general issue. This declaration, in legal effect, purported to charge that defendant maliciously prosecuted to judgment a suit against plaintiff in the courts of the State of Missouri, with malicious abuse of process in that suit. The evidence developed that plaintiff was an employee of defendant as a salesman, that such relationship was severed, and that defendant claimed an indebtedness from plaintiff and, subsequently learning that he owned a farm in Missouri, commenced a suit in attachment against plaintiff and attached his farm; that such proceedings were subsequently had that judgment was rendered against plaintiff, and his farm sold on final process, and that thereby he lost the farm; that all of said proceedings were had without notice to or the knowledge of plaintiff. The Missouri suit is characterized in the declaration as wrongful, fraudulent and malicious, and as instituted without probable cause.

In the conclusion to which we have come it is not necessary to advert to the merits or demerits of the cause. That conclusion rests in the failure of plaintiff

ALFRED THOMAS STEPHENSON COURT  
OF COMMONS

WILLIAM H. HARRIS,  
Appellant,  
vs.  
WILLIAM HARRIS & CO.,  
Appellees.

204 14330

THE JUDICIAL NOTICE TAKEN BY THE COURT.

This is an appeal from a judgment of \$1,000 entered upon the verdict of a jury in favor of plaintiff and against defendant, and defendant appeals.

The cause proceeded to trial on an amended declaration and the issue of the general issue. This declaration, in legal effect, purported to charge that defendant maliciously procured to judgment a suit against plaintiff in the courts of the State of Missouri, with malicious abuse of process in that suit. The evidence developed that plaintiff was an employee of defendant as a salesman, that such relationship was severed, and that defendant claimed an indebtedness from plaintiff and, upon plaintiff learning that he owned a farm in Missouri, commenced a suit in attachment against plaintiff and attached his farm; that such proceedings were subsequently had that judgment was rendered against plaintiff, and his farm sold on final process, and that thereby he lost the farm; that all of said proceedings were had without notice to or the knowledge of plaintiff. The Missouri suit is characterized in the declaration as wrongful, fraudulent and malicious, and as instituted without probable cause.

In the conclusion to which we have come it is not necessary to advert to the merits or demerits of the cause. That conclusion rests in the nature of plaintiff



to maintain by proof either count of his declaration. In the first place, he failed to prove by competent evidence the existence of the judgment or of the proceedings in the Missouri court. Neither did he make any proof by competent evidence of the laws of the State of Missouri governing or controlling such proceedings.

Defendant at the close of plaintiff's proofs made a motion in writing for an instructed verdict in its favor and tendered such an instruction in writing, with the request that the court give it to the jury. The request so to instruct the jury should have been granted.

The only evidence concerning the alleged judgment in the Missouri Court was that of plaintiff, where he testified that he discovered a judgment in favor of the Smith-Wallace Shoe Company against him for four hundred "or odd dollars" in July, 1910; that from the time he left until the time he discovered the judgment he did not receive any communication from the defendant stating that he owed them any money, nor any notice of the pendency of the suit. On cross-examination plaintiff stated that he saw the judgment shown on an abstract, but he did not remember whether the abstract showed the sale or not. Another witness testified that he knew through correspondence that defendant had in 1909 started an attachment suit in Missouri against the property of plaintiff, and that the property was afterwards sold. This testimony is insufficient to establish the fact of the attachment suit or the judgment.

Judgments of courts of record must, to be admissible in evidence, be proven in conformity to Chap. 51, Sec. 13, R. S., title "Evidence and Depositions," which is as follows:



to maintain by proof of the existence of the first place, as it is to be proved by competent evidence the existence of the judgment or of the proceedings in the Missouri court. Whether it be made out by competent evidence of the laws of the State of Missouri governing or controlling such proceedings.

Defendant at the close of Plaintiff's case made a motion in writing for an instruction verdict in its favor and tendered such an instruction in writing, and the court refused to give it to the jury. The record so far as the jury should have been instructed.

The only evidence concerning the alleged judgment in the Missouri court was that of Plaintiff, who testified that he discovered a judgment in favor of the said Plaintiff against him for four hundred and fifty dollars in July, 1911; that from the time he first until the time he discovered the judgment he did not receive any communication from the defendant stating that he owed him any money, nor any notice of the pendency of the suit. He cross-examination Plaintiff stated that he was the defendant on an affidavit, but he did not remember whether the contact made the suit or not. Plaintiff again testified that he knew from correspondence that defendant had in 1909 started an attachment suit in Missouri against the property of Plaintiff, and that the property was afterwards sold. This testimony is insufficient to establish the fact of the attachment suit or the judgment.

Plaintiff of course is bound to prove that the judgment in Missouri, as given in conformity to Chas. 21, Sec. 12, R. S., State of Missouri and provisions, which is as follows:

"The papers, entries and records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk."

When plaintiff closed his proofs there was no question of fact to be submitted to the jury. He had utterly failed to make the primary proof necessary to warrant a recovery.

As plaintiff failed to establish by proof any right of action under the averments of his declaration, the judgment of the Circuit Court is reversed and a judgment of nil capiat and for costs entered in this court.

REVERSED WITH JUDGMENT OF NIL  
CAPIAT AND FOR COSTS.

"The papers, exhibits and records of the case were proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk."

When plaintiff closed his prima facie case the question of fact as to the defendant's liability was left to the jury. He had actively failed to make the primary proof necessary to sustain a recovery.

As plaintiff failed to establish by direct and right of action under the provisions of his legislation, the judgment of the Circuit Court is reversed and a judgment of affirmance and for costs entered in his favor.

REVEREND JUDGE, CLEVELAND, OHIO

REVEREND JUDGE, CLEVELAND, OHIO

ABRAHAM SHARFF,  
Appellee,

vs.

FERDINAND HERMAN,  
Appellant.

APPEAL FROM THE SUPERIOR COURT  
OF COOK COUNTY.

204 I.A. 337

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The abstract of appellant is subject to the same criticisms of infirmities arising from non-compliance with the rules of this court regarding such abstracts as were made in Giuseppe Elia v. Societa Mutuo Soccorso Di Piane Crati, general number 22599. The reasons assigned for affirmance in the Elia case are equally applicable here, and on the authority of the opinion of Mr. Presiding Justice McSurely filed in that case on January 22, 1917, and not yet reported, and the cases therein cited, the judgment of the Superior Court is affirmed.

Notwithstanding the fact that we are not called upon to review the record before us on this appeal, we have nevertheless examined it together with the briefs filed, and are of the opinion that the judgment of the Superior Court is warranted and supported by the evidence and that in the record there is no reversible error.

AFFIRMED.





253 - 22687.

204 I.A. 338

PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

FRED C. FORSTER,

Plaintiff in Error.

) ERROR TO  
) CRIMINAL COURT  
) OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was convicted in a trial by jury in the Criminal Court of a conspiracy with one John Edison to cheat and defraud the National Lead Company out of the sum of \$506.08, and was sentenced to a two year term of imprisonment in the penitentiary and to suffer a fine of \$1000. From this conviction defendant seeks this review and argues for a reversal.

The original indictment consisted of six counts, the first three being what is commonly called conspiracy counts, the remaining three counts charging the obtaining of money by false pretenses by the practice of a confidence game. The conviction was on the conspiracy counts.

Much of defendant's argument falls flat because it is based on false premises. The State nolle prossed as to the three false pretense counts of the indictment, but by misprision of the clerk, the order was entered of record as to the conspiracy counts. When the State discovered the error the learned judge who presided at the trial on the motion of the State, entered a nunc pro tunc order which operated as a corrective to the misprision of the clerk, so that the record is before us on the conspiracy counts only.

2011.1.22

RECORD OF THE STATE OF  
ILLINOIS,  
Defendant in Error,  
vs.  
FRED C. FORSTER,  
Plaintiff in Error.

MR. JUSTICE HOLCOMB DELIVERED THE OPINION OF THE COURT.

Defendant was convicted in a trial by jury in the Criminal Court of a conspiracy with one John Edison to cheat and defraud the National Lead Company out of the sum of \$506.08, and was sentenced to a two year term of imprisonment in the penitentiary and to suffer a fine of \$1,000. From this conviction defendant seeks this review and argues for a reversal.

The original indictment consisted of six counts, the first three being what is commonly called conspiracy counts, the remaining three counts charging the obtaining of money by false pretenses by the practice of a confidence game. The conviction was on the conspiracy counts.

Each of defendant's arguments which are based on false premises. The state has promised as to the three false pretenses counts of the indictment, but by mis-  
pardon of the state, the order was reversed of record as to the conspiracy counts. When the state discovered the error the learned judge who presided at the trial on the motion of the state, entered a quid pro quo order which operated as a corrective to the misdirection of the jury, so that the record is before us on the conspiracy counts only.

2.

The testimony of the State if accorded credence by the jury was sufficient in its probative force to sustain the conspiracy charged beyond all reasonable doubt; therefore, unless errors of procedure prejudicially affecting the rights of defendant can be found in the record, we are not warranted in disturbing the judgment.

Defendant was an employe of the National Lead Company in its Chicago works in the metal department. One of the duties of defendant was to receive metal for his employer and to "O. K. a slip showing the amount of metal received by him." On March 4, 1910, defendant's co-conspirator in the indictment presented to the Chicago cashier of the Lead Company a bill for \$506.08, with a slip attached showing the metal, consisting of tin pipe, to have been received by defendant. In reliance upon the verities of defendant's certification of receipt of the metal, the cashier gave Edison the company's check on its Chicago bank account for the amount of \$506.08, certified as due. This check was paid in due course. The tin pipe was never received, the certification by defendant was false, and as the result of the conspiracy between defendant and Edison the Lead Company was swindled out of the amount of its check to Edison. The conspiracy counts and every essential element thereof were abundantly proven by the competent evidence of credible witnesses. Corroborating such testimony is defendant's confession of the crime to the Lead Company's general superintendent at Chicago. The substance of this confession was that defendant had been stealing from the Lead Company; that he had approved bills in the name of Edison for which no



The testimony of the State is recorded in the  
July and is not in its proper place in the  
complaint against the defendant; therefore,  
it is not a proper subject for the  
rights of defendant can be found in the record, and are not  
warranted in disturbing the judgment.

Defendant was an employee of the Chicago Lead Company  
in the Chicago works in the metal department. One of the  
duties of defendant was to receive metal for his employer  
and to "O. K." a bill showing the amount of metal received  
by him. On March 4, 1910, defendant's co-conspirator is  
the defendant presented to the Chicago cashier of the  
Lead Company a bill for \$602.08, with a bill attached show-  
ing the metal, consisting of tin pipe, to have been received  
by defendant. In reliance upon the verities of defendant's  
certification of receipt of the metal, the cashier gave  
Wilson the company's check on the Chicago bank account for  
the amount of \$602.08, certified as due. This check was  
paid in due course. The tin pipe was never received, the  
certification by defendant was false, and as the result of  
the conspiracy between defendant and Wilson the Lead Company  
was defrauded out of the amount of the check to Wilson. The  
conspiracy cannot be said to have been completed until the  
amount was paid by the company's cashier to Wilson's  
witnesses. Corroborating and testifying to defendant's  
conspiracy of the date to the Lead Company's cashier upon  
information of Chicago. The substance of this conspiracy was  
that defendant had been defrauded by the Lead Company; that  
he had approved bills in the name of Wilson for which no

3.

goods had been received; that as an excuse for his peculations and frauds, defendant stated that he needed between \$1500 and \$2000 for renewals on some patents in which he was interested, and that from the \$506.08 check he had received from Edison \$200. While defendant denied making the confession, the jury were justified in disbelieving him, especially in face of the fact that the State had by credible witnesses proven the crime as charged by that quantum of proof which the law requires.

There was no improper evidence admitted on the part of the State nor was admissible evidence proffered by defendant rejected. The corpus delecti and the venue were sufficiently proven. This is not a close case on the evidence. Defendant, under the evidence, is guilty beyond all peradventure. No remark of the court or of the counsel for the State can, with the convincing evidence in view, be held in any way to have prejudiced defendant's case upon the question of his guilt. In a close case upon the facts our ruling might be different. The instructions to the jury challenged are not subject to any legal infirmity.

The conviction is right and the judgment of the Criminal Court is affirmed.

AFFIRMED.

credible witness proven the crime as charged by that  
him, especially in view of the fact that the same day by  
the operation, the two were involved in this operation  
arrive from within 5000. This statement being  
was interested, and that from the 1934. On March 10 and re-  
1100 and 1200 for example or some persons in which 12  
tions and funds, according to what he stated between  
Goods had been received; that he was known for his previous  
Assistant of record which the law requires.

There was no improper evidence admitted on the part of the state nor was inadmissible evidence excluded by the court. The corpus delicti was proved beyond a reasonable doubt by the testimony of the witnesses who were present at the time of the murder. This is not a close case on the facts. The evidence, taken as a whole, is sufficient to establish the guilt of the defendant. No matter how much of the evidence is disregarded, the state can still prove its case. It is not fair to say that the state has failed to prove its case upon the facts. In a close case upon the facts, the jury may have some doubt. But here there is no doubt. The instructions to the jury are correct. The verdict is justified.

The conviction is affirmed and the judgment of the court is affirmed.

CHURCH

253 - 22687.

PEOPLE OF THE STATE  
OF ILLINOIS,

Defendant in error,

vs.

FRED C. FORSTER,

Plaintiff in error.

ERROR TO  
CRIMINAL COURT  
OF COOK COUNTY.

204 I.A. 338

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a petition for a rehearing interposed in  
behalf of the plaintiff in error.

Since the decision of this cause and the handing down  
of the opinion therein, defendant has changed his counsel and  
the withdrawal of the old and the substitution of new counsel  
have been made matters of record.

Notwithstanding the petition for rehearing flagrantly  
violates Rule 25 of this court - which provides that "in no  
case will any argument be permitted in support of such petition,"  
by rearguing in extenso with citation of numerous authorities  
the whole case, injecting into such argument matters and  
questions not touched upon in the original briefs of plaintiff  
in error - we have not thought fit to strike the petition from  
the cause, as we might, but have examined it in every particular.  
Whether our decision would have been different had the arguments  
now addressed to us been before us originally we do not deem it  
appropriate or necessary to decide. It is sufficient, however,  
to note that the matters discussed under point "I" in the  
petition are urged upon us in argument for the first time. This  
comes too late. New points and new arguments are of no avail in  
a petition for a rehearing. The remainder of the petition is an



REPORT OF THE BOARD  
OF LIAISON

Referred to error

vs.

THE O. BOARD

Referred to error

CRIMINAL COURT  
OF NEW YORK

MR. JUSTICE LORDE DELIVERED THE VERDICT OF THE COURT.

This is a petition for a rehearing intended to

defeat of the principle in error.

Since the decision of this court has been made known  
of the opinion therein, certainly has changed its course and  
the withdrawal of the case and the execution of the court  
have been made matters of record.

Notwithstanding the petition for rehearing intended

violates Rule 83 of this court - which provides that "in no

case will any argument be permitted in support of such petition,

by resubmitting in exhibits with citation of numerous authorities

the whole case, injecting into each argument matter and

questions not touched upon in the original briefs of counsel

in error - we have not thought it to strike the petition from

the cause, as we think, but have reserved it in every particular.

Whether our decision would have been different had the arguments

now addressed to us been before us originally we do not know.

It is difficult, however, appropriate or necessary to decide.

To note that the matter discussed under point "1" in the

petition are given upon us in argument for the first time. While

comes too late. But delays and new arguments are of no avail in

a petition for a rehearing. The resubmission of the petition to an

2.

argument of points previously discussed.

The petition for a rehearing is denied.

REHEARING DENIED.

...of police previously released.

The petition for a rehearing is denied.

RECEIVED

J. V. KINSMAN,  
Appellee,

vs.

BRUNSWICK-BALKE-COLLENDER  
COMPANY, a corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 339

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$87.25 entered upon the finding of the court under a submission of the cause to the court for trial. A collision between the automobiles of the parties is the gravamen of the action. Plaintiff was driving his own machine, while that of defendant was being driven by one of its employees.

The questions involved are all of fact. The testimony concerning the happening of the accident is in sharp conflict. If the evidence supporting the plaintiff's claim impressed the trial Judge, as it does us, as being a true narration of the events which led to the collision of the two automobiles, it follows that the evidence in defense was not sufficiently credited by the trial Judge to overcome the case made by plaintiff's evidence. We are not able to say that the conclusion of the trial Judge on the evidence found in the record was contrary to its probative force or manifest weight. This case is analogous to and is governed by the principles set forth in Gardner v. Ben Steele Weigher Manufacturing Co., 142 Ill. App. 348.

We are satisfied from the evidence in this record that the negligence of the servant of defendant set forth in the statement of claim was the cause of the collision which



WILLIAM JOHN HENNINGSON COURT  
OF CHICAGO.

J. V. ALBANY,  
Appellee,  
vs.  
BRASSIERE-KALSH-CORPUS  
COMPANY, a corporation,  
Appellant.

20111102

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$37.75 entered upon the finding of the court under a submission of the cause to the court for trial. A collision between the automobiles of the parties is the proximate cause of the action. Plaintiff was driving his car westward, with a load of defendant was being driven by one of its employees.

The questions involved are all of fact. The

testimony concerning the happening of the accident is in sharp conflict. If the evidence supporting the plaintiff's claim impressed the trial judge, as it does us, we could not true narration of the events which led to the collision of the two automobiles, it follows that the evidence so before was not sufficiently credited by the trial judge to overcome the case made by plaintiff's evidence. We are not able to say that the conclusion of the trial judge on this evidence found in the record was contrary to the preponderance of the manifest weight. This case is manifest to and is reversed by the principles set forth in Corbett v. New England Paper Manufacturing Co., 148 Ill. App. 542.

We are satisfied from the evidence in this record that the negligence of the servant of defendant set forth in the statement of claim was the cause of the collision with

resulted in damaging the plaintiff's car to the amount awarded him by the trial Judge.

The judgment of the Municipal Court is affirmed.

**AFFIRMED.**

resulted in dragging the plaintiff's car to the court yard  
him by the trial judge.

The judgment of the Municipal Court is affirmed.

ATTEST.

PETER DAHLGREN,  
Appellee,

vs.

LOUIS ISRAEL and  
ISAAC ISRAEL,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 340

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action of the fourth class in the Municipal Court and is in tort. The trial was before the court and a jury. There were originally two other defendants, who were dismissed out of the case during the progress of the trial, the cause going to the jury against the two defendants, appellants here. The jury returned a verdict for \$1,000, upon which, after the overruling of the usual motions for a new trial and in arrest of judgment, the judgment appealed from was entered.

The verdict is criticised as not being sustained by the evidence, and the court's refusal to instruct a verdict for defendants is assigned for error. The goods set forth in the statement of claim were stolen. Some of the witnesses had criminal records. The evidence was in sharp conflict. The determination of the credibility of the witnesses and the weight to be accorded their evidence was the task of the jury. The trial Judge, whose opportunities of seeing the witnesses and of determining such credibility and weight were equal to those of the jury, signified his concurrence with the conclusion reached by the jury by the entry of judgment thereon. In these circumstances we are not permitted to interfere with the finding of the jury and the judgment of the court unless we can say - which we cannot - that the verdict and



UNITED STATES DISTRICT COURT  
OF CHICAGO

ISRAEL ISRAEL and  
ISRAEL ISRAEL,  
Appellants.  
vs.  
ISRAEL ISRAEL,  
Appellee.

MR. JUSTICE HOLDS DELIVERED THE OPINION OF THE COURT.

This is an action of the fourth class in the Michigan Court and is in fact. The trial was before the court and a jury. There were originally two other defendants, who were dismissed out of the case during the progress of the trial, the cause going to the jury against the two defendants. The jury returned a verdict for \$1,000, upon which, after the overruling of the usual motion for a new trial and in arrest of judgment, the judgment appealed from was entered.

The verdict is criticized as not being sustained by the evidence, and the court's refusal to instruct a verdict for defendant is assigned for error. The facts set forth in the statement of claim were stated. Some of the witnesses had criminal records. The evidence was in sharp conflict. The determination of the credibility of the witnesses and the weight to be recorded their evidence was the task of the jury. The trial judge, whose opportunity of seeing the witnesses and of determining each credibility and weight were equal to those of the jury, signified his concurrence with the conclusion reached by the jury by the entry of judgment thereon. In these circumstances we are not permitted to interfere with the finding of the jury and the judgment of the court unless we can say - which we cannot - that the verdict was

judgment are manifestly contrary to the probative force of the evidence. It is our judgment that the evidence supports the verdict.

The value of the goods stolen is set forth in the statement of claim as amended as \$1485.66. Plaintiff, however, limited his right of recovery to \$1,000, and waived the balance so as to bring his case within actions of the fourth class. Defendants insist that the court had no jurisdiction of the case in the fourth class division of the court because the actual value of the goods involved exceeds the jurisdictional amount of \$1,000. To this insistence we are unable to agree. Plaintiff had a right to choose his forum and to minimize, for jurisdictional purposes, the amount of his claim if he saw fit to do so. Certainly defendants cannot be heard to complain of a procedure which was so much to their advantage. Errors must, to be reversible, be injurious in some way to the interest of the party assigning error. If no harm has resulted, a court of review will not reverse for mere matters of form which lack substance affecting substantial rights. This procedure finds support by analogy to the practice in vogue from time immemorial before justices of the peace, where claims exceeding the jurisdictional amount were entertained on remittitur to the jurisdictional sum. Furthermore, defendants made no such issue by their affidavit of meritorious defense. They are therefore debarred from raising the point on review for the first time. The claim of plaintiff was limited to \$1,000 and the judgment is for that amount only. The proceeding, from inception to judgment, was for a claim within the jurisdiction of the court as a case of the fourth class.

Remarks of the court made in the presence of the jury are claimed to have been injurious to defendants. The

judgment are manifestly contrary to the preponderant force of the evidence. It is our judgment that the evidence supports the verdict.

The value of the goods stolen is not in issue. The amount of claim as pleaded is \$1483.66. Plaintiff, however, limited his right of recovery to \$1,000, and waived the balance so as to bring his case within section of the fourth class. Defendant insists that the court had no jurisdiction of the case in the fourth class division of the court because the actual value of the goods involved exceeds the jurisdictional amount of \$1,000. To this instance we are unable to agree. Plaintiff had a right to choose his form and to minimize, for jurisdictional purposes, the amount of his claim if he saw fit to do so. Certainly defendant cannot be heard to complain of a procedure which was so much to their advantage. Errors must, to be reversible, be injurious in some way to the interest of the party assuming error. If no harm has resulted, a court of review will not reverse for mere matters of form which lack substance affecting substantial rights. This procedure finds support by analogy to the practice in venue from time immemorial before Justices of the Peace, where claims exceeding the jurisdictional amount were entertained on petition to the jurisdictional and. Furthermore, defendants made no such issue by their affidavit of meritorious defense. They are therefore deprived from raising the point on review for the first time. The claim of plaintiff was limited to \$1,000 and the judgment is for that amount only. The proceeding, from inception to judgment, was for a claim within the jurisdiction of the court as a case of the fourth class.

Remarks of the court made in the presence of the jury are claimed to have been injurious to defendants. The



words objected to are: "The Criminal court is still located over on the North Side, and if I detect any perjury in the case the person who testifies falsely is going over to the North Side to answer for it." It will be noticed that these remarks were entirely impersonal, of a general character, and without reference to any particular witness. We are not prepared to say but that from the character of some of the witnesses, which appears from the testimony, the remarks were not only justified but were salutary, as a precautionary measure to suppress false testimony and to develop the truth. The language of the court cited cannot be construed as injurious to defendants' defense or as having influenced the verdict of the jury contrary to the merits of the cause. Eckels v. Halsten, 136 Ill. App. 111.

It is contended that plaintiff did not prove that he was a common carrier, that the goods were not sufficiently identified or their value proven by competent evidence. To these contentions we do not agree. The evidence in the record is sufficient to sustain the findings of the jury on these points against defendants.

The jury in their verdict as first rendered undertook, after assessing plaintiff's damages at \$1,000, to apportion the amount each defendant should contribute toward the payment of the same, and although the jury had sealed their verdict and disbanded, the court on their reassembling again had the jury retire to reform their verdict, which they did by eliminating therefrom the apportionment of the amount of the verdict. It is said that the court had no power or authority for this action. If this contention were well taken it would be inoperative to avoid the effect of the verdict as rendered, because the verdict was complete and



words objected to are: "The original count is still located over on the North Side, and if I detect any party in the case the person who testifies falsely is going over to the North Side to answer for it." It will be noticed that these remarks were entirely impersonal, of a general character, and without reference to any particular witness. We are not prepared to say that that from the character of some of the witnesses, which appears from the testimony, the remarks were not only justified but were salutary, as a precautionary

measure to suppress false testimony and to develop the truth. The language of the count cited cannot be considered as injurious to defendants' defense or as having influenced the verdict of the jury contrary to the merits of the case. Locke v. State, 136 Ill. App. Ill.

It is contended that plaintiff did not prove that he was a common carrier, that the goods were not actually identified or their value proven by competent evidence. To these contentions we do not assent. The evidence in the record is sufficient to sustain the findings of the jury on these points against defendants.

The jury in their verdict as first rendered, undertook, after assessing plaintiff's damages at \$1,000, to apportion the amount each defendant should contribute toward the payment of the same, and although the jury had rendered their verdict and disbanded, the court on their reassembling again had the jury retire to render their verdict, which they did by eliminating therefrom the apportionment of the amount of the verdict. It is said that the court had no power or authority for this action. If this contention were well taken it would be imperative to avoid the effect of the verdict as rendered, because the verdict was complete and

in due form to the point where the apportionment occurred, and the court might, on its own motion, have stricken that part from the verdict as surplusage, leaving the verdict in the form in which the jury ultimately returned it and in the form in which the court ordered it recorded. It is the recorded verdict which controls. Holcomb v. Linn, 174 Ill. App. 419. Moreover, the question regarding the correction, after sealing, of the verdict of the jury when it again convenes, is settled in this State. It was held in Nolan v. East, 132 ibid 634, that "the court did not err in reconvening the jury after they had returned their verdict to correct an obvious error therein \* \* although it was a sealed verdict, since signing which the jury had separated for the night." Rigg v. Cook, 4 Gilm. 352. A verdict may be changed by the jury before acceptance by the court and its being ordered to be recorded. Martin v. Morelock, 32 Ill. 485. The fact that the verdict was sealed and the jury had separated did not affect the situation.

The trial did justice between the parties and the judgment of the Municipal Court is affirmed.

AFFIRMED.

in due form to the point where the apportionment occurred, and the court might, on its own motion, have ordered that part from the verdict as surplusage, leaving the verdict in the form in which the jury ultimately returned it and in the form in which the court ordered it recorded. It is the re-

corded verdict which controls. Holcomb v. Mann, 174 Ill. App. 419. Moreover, the question regarding the correction, after sealing, of the verdict of the jury when it again comes, is settled in this State. It was held in Holman v.

West, 132 Ill. 624, that "the court did not err in reversing the jury after they had returned their verdict to correct an obvious error therein \* \* \* although it was a sealed ver-

dict, since signing which the jury had separated for the night." Rich v. Cook, 4 Ill. 398. A verdict may be changed by the jury before acceptance by the court and its being ordered to be recorded. Martin v. Morlock, 83 Ill. App. The fact that the verdict was sealed and the jury had separated

did not affect the situation.

The trial did injustice between the parties and the judgment of the Municipal Court is affirmed.

AFFIRMED.

267 - 22701.

JAMES GOGGIN, )  
Appellee, )

vs. )

MARGARET A. COLLINS, )  
Appellant. )

204 I.A. 342

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill for a mechanic's lien against certain real estate improved with an apartment house of defendant, Margaret A. Collins, and secured a decree establishing the lien claimed for the sum of \$800, with interest and costs. This decree was entered upon the report of a master to whom the cause had been referred.

Complainant made a written contract with Margaret A. Collins for the lathing and plastering of an eighteen apartment building for the sum of \$4660. The contract provided that payment should be made upon certificates of the architect as the work progressed. The final certificate of the architect, it was agreed, should be conclusive on the parties. From time to time the architect issued certificates to complainant aggregating \$4000, leaving unpaid on the contract price \$660. Complainant also claims \$202.90 for extra work.

The evidence demonstrates that the work of complainant was not satisfactory to the architect. On January 22, 1915, the architect wrote complainant a letter in which he said, "Sorry to state that your work is not satisfactory, that you have delayed the building beyond the





renting season \* \*" and enclosed a debit account in which he charged the complainant with \$1158.90, in which \$500 was deducted for inferior work and \$540, at \$15 per day, for delay in doing and completing the work in accordance with the stipulation to that effect found in the contract. This was the last certificate, or document in the nature of a certificate, which the architect issued to complainant. The building was thereafter turned over to Collins and she settled with the architect for his services, from which time, it is contended, his duties as architect ceased.

It appears from the proofs that the so-called final certificate in evidence, the basis of complainant's bill, was procured by complainant from the architect after the final statement above referred to had been given to him by the architect and after the architect had completed his duties under the contract and his service had ended; that the architect told complainant that he was no longer acting as architect for Margaret A. Collins, but nevertheless complainant continued to call at his office and to annoy him with a demand for a certificate for the amount he claimed was his due, and that, as the architect testified, not because complainant was entitled to it but to get rid of him, he gave complainant the so-called final certificate now in dispute.

It is clear that complainant knew that his work was not satisfactory and that the architect was not satisfied with the manner in which he had performed his contract, and that the itemized account which the architect sent to complainant on January 22, 1915, informed him in detail of the architect's judgment and opinion as to the financial obligation between complainant and Mar-

...and was found to be in accordance with the ...  
 he observed the employment with ...  
 was reduced for interior work and ...  
 for delay in doing and completing the work in accordance  
 with the stipulation to that effect found in the contract.  
 This was the last certificate, or statement in the nature  
 of a certificate, which was exhibited to the ...  
 and. The building was thereafter burned down in ...  
 and the action with the ...  
 from which time, it is understood, the ...  
 ceased.

It appears from the ...  
 (and) certificate in evidence, the ...  
 will, was procured by ...  
 the final statement above referred to and ...  
 and by the ...  
 his duties under the contract and his ...  
 that the ...  
 acting as ...  
 from employment ...  
 every day with a ...  
 in ...  
 listed, not because ...  
 to get rid of him, or ...  
 (and) certificate ...

It is clear that ...  
 with was not ...  
 satisfied with the ...  
 contract, and that the ...  
 fact that in compliance on January 22, 1917, ...  
 him in detail of the ...  
 to the financial relation between ...

garet A. Collins. The statement and letter of January 22, 1915, were in effect, both in law and in fact, the final certificate of the architect to complainant, from which complainant knew that the architect found that instead of the owner being indebted to complainant on the contract, complainant was indebted to her several hundred dollars.

In view of these conditions, we hold that the architect had no authority or power to issue the certificate for \$800 on which this action is based, and that as to Margaret A. Collins the issuing of said certificate was a fraud and not binding upon her. Monahan v. Fitzgerald, 164 Ill. 525.

As this action rests for its support upon the so-called architect's certificate for \$800, which we hold was fraudulently issued, the complainant has no right to maintain the decree appealed from.

The decree of the Circuit Court is therefore reversed and the cause is remanded to the Circuit Court with directions to that court to enter a decree dismissing complainant's bill for want of equity.

REVERSED AND REMANDED  
WITH DIRECTIONS.



James A. Hollins. The statement was dated at January 22, 1915, was in effect, both in law and in fact, the final discharge of the student to completion, from which completion came that the student found that instead of the owner being indebted to completion on the contract, completion was indebted to her several hundred dollars.

[illegible]

. 462 . 551 441 . 750000

As this section refers to the report upon the  
so-called scientist's certification for the  
and finally, the certification for the  
maintain the same standard for

with attention to that point to enter a proper inquiry, and the same is required in the present case.

278 - 22712

ELIZABETH BAXTER,  
Appellee,

vs.

ROTHSCHILD & COMPANY,  
a corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

204 I.A. 346

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$2500 entered upon the verdict of a jury in an action for personal injury.

At the time plaintiff was injured she was in the building in which defendant was carrying on a commercial business. The building was not quite completed, the processes of construction not quite ended. The painting contractor, among others, was, in the performance of his painting contract, personally at work near the elevators in the northeast corner of the main floor at the time of the accident, and had laid a heavy canvass on the floor in front of some of the elevators to serve as a drop cloth. The evidence shows that plaintiff, a customer of appellant's store, descended from an upper floor to the first floor in an elevator furnished by defendant for that purpose, and stepped out from the elevator to the floor; that she tripped and fell upon an uneven, rough canvass in front of the elevator; that one of her feet caught in a fold or loop of the canvass, throwing her to the floor and injuring her as detailed in the evidence, lay and medical. It is charged that the negligence consisted in defendant's maintaining the canvass on the floor without fastening the same, so that it became wrinkled, folded and gathered in

SILVERMASTER, WALTER  
Appellee.

vs.

WORTHINGTON & COMPANY,  
a corporation.  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

2017 A. 346

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a judgment of \$2500.

entered upon the verdict of a jury in an action for personal injury.

At the time plaintiff was injured she was in

the building in which defendant was carrying on a commercial

business. The building was not quite completed, the necessary

of construction not quite ended. The plaintiff, plaintiff,

some others, was, in the performance of his painting con-

tract, personally at work near the elevator in the north-

west corner of the main floor at the time of the accident.

and had laid a heavy canvas on the floor in front of some

of the elevators to serve as a drop cloth. The evidence

shows that plaintiff, a co-owner of appellant's estate,

descended from an upper floor to the first floor in an

elevator furnished by defendant for that purpose, and

stepped out from the elevator on the first; that she

tripped and fell upon an uneven, rough canvas in front

of the elevator; that one of her feet caught in a fold or

loop of the canvas, throwing her to the floor and in-

flung her as detailed in the evidence, for and without.

It is contended that the negligence consisted in defendant's

maintaining the canvas on the floor without fastening the

same, so that it became wrinkled, folded and unsmoothed.



loops, and that while plaintiff was walking with due care for her own safety, her foot caught in a fold of the canvass, causing her to stumble and injuring her.

The principal defense made is that the place where the accident occurred was in the possession of independent contractors, and that defendant is not liable for the acts or omissions of the servants of an independent contractor. We do not think the independent contractor defense is available on the undisputed facts. Defendant was operating its business; it was in possession of the premises. The occupancy thereof by the contractor was only incident to the possession of defendant. The contractor was not in possession of the premises. His being there and doing work on the building did not constitute that kind of possession which obtains to an independent contractor and which releases the owner from liability for the acts of such contractor and his servants. The whole theory of non-liability rests in the possession being in the contractor to the exclusion of the owner. The situation in Glickauf v. Maurer, 75 Ill. 289, is analogous to the instant case. The court there said:

"There was no such surrender of the entire possession of the premises to the workman as could relieve appellants of responsibility. The arrangement made amounts merely to this: appellants employed a mechanic to make certain repairs upon a building, a portion of which was occupied by appellee. In making the repairs the mechanic can only be regarded as the servant of appellants, and we see no reason why they should not be held responsible for the negligence of the mechanic in doing work."

So, in this case, the contractor was the servant of defendant. The negligence of the contractor is therefore imputable to defendant. The doctrine of independent contractor has no application to this case. Defendant being in possession of the building, operating its business, cannot shift the duty that it owed to its customers upon the painting contractor. It is the law that so long as defendant



...and that while Plaintiff was dealing with the ...  
...for her own safety, her first thought is to ...  
...value, causing her to ...  
...The principal ...  
...to the ...  
...agreement ...  
...the ...  
...error. We do not ...  
...is available on the ...  
...and its business; it was in ...  
...necessarily ...  
...possession of defendant. The ...  
...for of the ...  
...building ...  
...claim to an independent ...  
...owner from ...  
...sensitive. The ...  
...possession ...  
...owner. The ...  
...analysis to the ...  
...There was no ...  
...action of the ...  
...policy of ...  
...treaty to ...  
...certain ...  
...occupied by ...  
...can only be ...  
...but no ...  
...for the ...  
...is ...  
...of defendant. The ...  
...impute to ...  
...factor and ...  
...possession of ...  
...with the ...  
...the ...

kept its place of business open and customers were invited and permitted to enter therein to trade, defendant owed the duty to its customers to keep its building in a reasonably safe condition so that no injury would happen to them while in the exercise of ordinary care.

There were other defendants originally in the case who were subsequently dismissed out of it. To these defendants, for the consideration of \$625, plaintiff gave a covenant not to prosecute. Defendant contends that the settlement made was an accord and satisfaction, and that consequently all the parties were released, and that the doctrine that where one joint tortfeasor is released, all are released, applies. We think this question was properly left to the jury and that they might properly find that the money received from the other defendants was an undertaking not to prosecute and was not received in settlement of the case.

After the jury retired to consider their verdict an instruction regarding the amount of the ad damnum was given by the court at the request of the jury. The amended declaration laid the ad damnum at \$15,000 and the additional counts at \$10,000. The court instructed the jury in writing that the lesser amount was the ad damnum in the case. Of this defendant complains and contends that it was reversible error to so instruct the jury after they had retired to consider their verdict. We can see no point to this contention, as defendant suffered no harm from the giving of such instruction.

The verdict was supported by the evidence; the instruction to direct a verdict, asked by defendant, was properly refused; there is no error in the court's ruling upon the instructions; the jury were warranted in finding

that the list of persons who were interviewed was limited and restricted to only those in whose, defense, was the duty to the court to keep the matter in a reasonably self-contained so that no inquiry would be made as to who was in the exclusive of ordinary case.

They were given reference especially in the case who were subsequently dismissed out of it. In these defendants, for the consideration of 1934, plaintiff gave a statement not to present. Defendant contends that the settlement made was an accord and satisfaction, and that defendant's all the parties were released, and that the defendant that when the joint tortfeasor is released, all are released, parties. We think the question was properly left to the jury and that they might properly find that the money received from the joint defendants was an understanding not to prosecute and was not received in satisfaction of the case.

That the jury returned in support of their verdict an instruction regarding the amount of the damages was given by the court as the request of the jury. The amount of damages was \$10,000 and the instruction was \$10,000. The court instructed the jury in which case at \$10,000. The court instructed the jury in which case that the lesser amount was the amount in the case. If this defendant's complaint and defense was it was responsible error to be instructed the jury after they had retired to consider their verdict. It was no point in this case, as defendant withdrew by order of the court the question of who is

the verdict was supported by the evidence; the instruction is correct, and the defendant, was properly refused; there is no error in the court's finding that the instruction; the jury were instructed in finding

that plaintiff was not guilty of any contributory negligence which was the proximate cause of her injuries. We are unable to say that the damages awarded are excessive for the injuries sustained.

There is no reversible error in this record and the judgment of the Circuit Court is affirmed.

AFFIRMED.



and the fact that the Government has not been able to obtain the necessary information from the Government of the United States to enable it to take the necessary steps to prevent the export of such information to the United States.

the judgment of the District Court is affirmed.

MARGARET HUDSON,  
Appellee,  
  
vs.  
  
MERCHANTS RESERVE LIFE  
INSURANCE COMPANY,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 348

MR JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On a trial before the court and jury plaintiff had a verdict and judgment for \$1667, and defendant appeals.

The foundation of the action is two policies of insurance for \$1,000 each upon the life of John P. Hudson, in both of which the plaintiff, his wife, was the beneficiary. Proofs of death were made under each policy, and it is claimed that thereafter, on September 12, 1912, plaintiff signed on the back of each policy a receipt in full for \$1,000; that on that date a check for \$2,000 on the National Bank of the Republic was drawn by the defendant to the order of currency. It is contended that Hendricks, the president of defendant, cashed this check; that it was drawn as stated upon its face "In full settlement of Hudson claim, policies Nos. 1054, 1122," being the policies in suit; that Hendricks, after cashing this check, paid plaintiff \$600; that this \$600 payment was in full settlement of plaintiff's claim under both policies, and that such settlement was a compromise between the parties of plaintiff's claim, the defendant Company claiming a defense to both policies on the ground of false statements concerning the health and habits of the insured made in his application for insurance, and failure to commence suit within one year. On the other hand, plaintiff claims that

THE COURT HAS CONSIDERED THE EVIDENCE

AND HAS REACHED THE CONCLUSION THAT THE DEFENDANT IS GUILTY OF THE CHARGE

2011.1.10.348

IT IS THE ORDER OF THE COURT THAT THE DEFENDANT BE FINED \$100.00

On a trial before the court and jury, the defendant was charged with the crime of murder in the first degree. The charge was based upon the fact that the defendant had killed the victim with a deadly weapon, to-wit: a revolver. The evidence presented at the trial was as follows:

The victim, a man of the name of [redacted], was born on [redacted] and died on [redacted]. He was a resident of [redacted] and was employed as a [redacted]. The defendant, a man of the name of [redacted], was born on [redacted] and is a resident of [redacted]. He was employed as a [redacted].

On the day of the murder, the defendant and the victim were together at [redacted]. The defendant was holding a revolver and was talking to the victim. The victim was holding a glass of beer and was drinking. The defendant suddenly turned on the victim and fired the revolver, killing him. The defendant then fled the scene and was later arrested.

The evidence at the trial was as follows: The victim's body was found on the ground, with a bullet wound in the chest. A revolver was found near the body. The defendant was seen running away from the scene. The defendant was arrested and confessed to the crime.

The jury found the defendant guilty of murder in the first degree. The court sentenced the defendant to a term of imprisonment for life.

the \$600 payment was simply on account and that Hendricks promised to pay the \$1400 balance soon thereafter, saying, "You sign the receipt for the \$600 and when the records are all gone through, and we can prove up things right, you will get the balance of the money."

Plaintiff gave a receipt for the \$600, which is not in evidence. Hendricks, with whom the alleged settlement was made, did not testify. Defendant's defense resolves itself into one in the nature of an accord and satisfaction. The contentions regarding failure to commence a suit within the year provided for in the application for the policies and the falseness of the representations as to the health and habits of the insured made in the application, are not, in the condition of the record, material to be inquired into.

One Parker S. Webster was the attorney for plaintiff who represented her in this matter until the time of the alleged settlement for \$600. Webster was present as the legal adviser of plaintiff at the time the \$600 was paid. Plaintiff gave in evidence her understanding of the conversation and agreement with Hendricks at the time of her receipt of the \$600 from him. Webster was a witness to the transaction and defendant put him on the witness stand and interrogated him as to what occurred at that time. Webster declined to answer the questions put to him on the ground that the communications were privileged, and plaintiff thereupon joined the witness in objection to his making answer to these questions, for the reasons stated by him. The court sustained plaintiff's objection and refused to permit Webster to answer the questions put to him concerning what transpired between his client and Hendricks at the time Hen-



The \$500 payment was simply an account and that Hendricks  
promised to pay the \$100 balance soon thereafter, saying,  
"You sign the receipt for the \$500 and when the records are  
all gone through, and we can prove up things right, you will  
get the balance of the money."

Plaintiff gave a receipt for the \$500, which is  
not in evidence. Hendricks, with whom the witness had a  
long acquaintance, did not testify. Defendant's defense was  
based on the fact that the receipt was not in evidence.  
The contention regarding failure to produce a valid receipt  
the year provided for in the application for the policies and  
the issuance of the representation as to the health and  
habits of the insured was in the application, and not, in  
the condition of the record, entered to be produced into  
evidence.

The fact that the receipt was the attorney for  
plaintiff who represented her in this matter until the time  
of the alleged settlement for \$500. Defendant was present  
as the legal adviser of plaintiff at the time the \$500 was  
paid. Plaintiff gave in evidence her understanding of the  
conversation and agreement with Hendricks at the time of her  
receipt of the \$500 from him. Defendant was a witness to the  
transaction and defendant put his on the witness stand and  
introduced him as he had occurred at that time. Defendant  
refused to answer the questions put to him by the jury.  
That the communications were privileged, and plaintiff inter-  
posed the witness in objection to his making answer  
to these questions. For the reasons stated by him. The  
court sustained plaintiff's objection and refused to permit  
defendant to answer the questions put to him concerning what  
transpired between his client and Hendricks at the time the

dricks paid plaintiff the \$600.

It is clear, we think, that the communications referred to were not privileged; that they were not communications between attorney and client, but communications made to a third party by the client and attorney, and that they in no respect come under the ruling of professional communications which are privileged. We think a most excellent illustration applicable to the instant case is found in Thayer v. McEwen, 4 Ill. App. 416, in which the court said:

"We are all of the opinion that this was error in the court below. It is the right of every one to freely communicate to his counsel any matter concerning his case, to the end that the counsel can properly prepare and present his client's cause to the court or jury, and all such communications are properly privileged, but we are aware of no case holding that an attorney is privileged from testifying to any agreement made with the opposite party at the request of his own client. Such a transaction does not come within the rule of privileged communications between attorneys and client. Since the claim of appellant as to the terms of the contract was disputed by the appellees, we can see that this action of the court might and probably did work serious injustice to the appellant."

Even had the communication been privileged, its character as such was waived by plaintiff testifying in relation thereto. In other words, plaintiff had given her version of the conversation and agreement with the president of defendant at the time of the alleged settlement. It was therefore the privilege of defendant to call, in contradiction of plaintiff, her attorney or any other witness to the conversation. The rule is well settled in People v. Gerold, 265 Ill. 448, thus:

"While the general rule is that all confidential communications between attorney and client made because of their relationship and concerning the subject matter of the attorney's employment are privileged from disclosure, and counsel are not at liberty, even if they wish, to testify concerning them, (People v. Barker, 56 Ill. 299; Thorp v. Goewey, 85 id. 611; 1 Greenleaf on Evidence, (Lewis' ed.) sec. 237; State v. Douglass, 20 W. Va. 770; Spaulding v. State, 61 Neb. 289; State v. Snowden, 23 Utah, 318); yet the client himself can waive such privi-





lege, and does so where he voluntarily testifies himself to confidential communications between himself and his attorney. Such waiver, however, extends no further than the subject matter concerning which testimony had been given by the client. 1 Thornton on Attorneys, secs. 92, 130, and cited cases: Knight v. People, 192 Ill. 170."

It is also contended that the court erred in refusing to permit defendant to explain the purpose of the receipts on the back of the policies. It is the settled law in this State that receipts may be explained orally. Starkweather v. Maginnis, 196 Ill. 274; Carr v. Miner, 42 ibid 179; Reading v. Traver, 83 ibid 372.

For the errors indicated the judgment is reversed and the cause remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.



fact, and that no other voluntarily executed himself  
 to confidential communication between himself and his  
 attorney. Such matter, however, is not relevant to  
 the subject matter concerning which testimony was given  
 by the witness. I therefore so instruct, and so  
 direct the jury: United v. Tivney, 122 Ill. 174.

It is also contended that the court erred in  
 refusing to permit defendant to explain the purpose of the  
 receipts on the basis of the policies. It is the well-  
 known fact in this case that receipts may be explained orally.  
United v. Tivney, 122 Ill. 174; United v. Tivney, 122 Ill. 174; United v. Tivney, 122 Ill. 174.

For the errors indicated the judgment is re-  
 versed and the cause remanded to the Appellate Court for a  
 new trial.

REVEREND AND HONORABLE

CHRISTIAN JOHNSON,  
Appellee,

vs.

PAUL F. F. MUELLER,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

204 I.A. 349

MR. JUSTICE HOLBOM DELIVERED THE OPINION OF THE COURT.

This cause has been twice tried before court and jury. The first trial resulted in a judgment for \$3000 and the second, now before us, in a judgment for \$2000 on a remittitur of \$1,500 from the verdict. The facts and the law governing such facts are stated in the opinion of this court rendered on a review of the first judgment, which is reported in abstract form in 192 Ill. App. 422. This opinion is the law of this case except in so far as new elements are injected into the case upon the second trial. In the opinion supra this court said:

"Plaintiff alleges that while engaged in wedging the shores which had already been placed in position under the boxes, by the defendant, a shore nearby, so placed in position by defendant, but through negligence not nailed to the box overhead, fell and struck plaintiff, inflicting injuries.

Upon the trial no witness testified that the shore which fell and struck plaintiff was one which had been before that placed in position under a box. The most that can be said is that after plaintiff was struck a shore was found lying on the floor by him, which had no nail-holes in the upper cross-piece. Neither plaintiff nor his witnesses undertake to say where this shore was standing just before it fell. It does not appear that after the accident any shore was missing from those standing in position under the beam where plaintiff worked, or from any other place nearby. There was testimony tending to show that plaintiff himself, before placing shores in position, frequently leaned them against the upright columns, and that he had been warned of the danger of their falling from that position. One witness testifying for defendant said that the plank which struck plaintiff 'was uprights leaning against another upright.'





These considerations, with other details and circumstances in evidence unnecessary now to narrate, impel us to the opinion that justice will be better served by requiring a new trial, at which it may be possible to show with reasonable certainty from whence the shore or upright in question fell. Plaintiff is bound to prove the negligence alleged in his declaration, and the single fact that plaintiff was struck by the falling shore, is not sufficient."

The proof that was lacking in the first trial to sustain the verdict was amply supplied on the second, as appears from the record before us. We think the jury might well find from the evidence that the accident resulted from the negligence of defendant charged in the declaration, and that the accident and the resulting injury to plaintiff were caused through the negligence of defendant in failing to fulfill the legal requirement of furnishing plaintiff a safe place in which to work. The claim that the accident was caused either by plaintiff himself or his alleged fellow workman, Benson, placing loose planks against an iron column just previous to or at the time of the accident, was thoroughly overcome by the testimony of several witnesses, whom the jury were warranted in believing.

It would have been error for the court to have instructed a verdict for defendant, as requested by him, either at the close of plaintiff's proofs or at the conclusion of all the proofs.

There was no error in refusing to give instructions Nos. 22 and 23 proffered by defendant. No. 22 was disposed of in the prior opinion of this court, and No. 23 invaded the province of the jury to determine the fact as to who was a fellow servant of plaintiff. In the condition of the evidence the question as to who was a fellow servant with plaintiff was not one of law but of fact and not analogous to Meyer v. Illinois Central R. R. Co., 177 Ill. 591. The jury were suffi-



"These considerations, with other details and circumstances in evidence and necessary to be made known to the jury, are of such a nature that it is not possible to know with reasonable certainty from the evidence or that it is in doubt in the jury's mind. It is found to prove the negligence alleged in the complaint, and the same fact plaintiff was struck by the falling stone, is not sufficient."

The proof that was lacking in the first trial

to sustain the verdict was easily supplied on the second, as

appears from the record before me. We think the jury

ought well to find from the evidence that the accident re-

sulted from the negligence of defendant charged in the

complaint, and that the defendant was the proximate cause

of the injury. It is found that the negligence of

defendant in failing to fulfill the legal requirement of

maintaining plaintiff's safe place is not to be denied. The

evidence that the accident was caused solely by plaintiff

himself or his fellow fellow workers, is not sufficient

to show that the accident was caused solely by plaintiff

the fact of the accident, and the negligence of the

testimony of several witnesses, and the jury were authorized

in believing.

It would have been error for the court to have

instructed a verdict for defendant, as requested by him,

either at the time of plaintiff's motion or at the conclusion

of all the proofs.

There was no error in refusing to give instructions

and to only be offered by defendant. And it was not error to

in the first opinion of this court, and so. It involved the

premise of the fact in defendant's favor as to the fact

of the negligence of plaintiff. In the conclusion of the evidence

the question as to who was a fellow servant with plaintiff was

not one of law but of fact and not analogous to Kear v. Hill

note (Century) 5. 8. 22. 177 Ill. 521. The jury were well-

ciently and accurately instructed as to the law of the case and the theory of the defense.

Defendant attached a copy of the former decision of this court as an appendix to his brief. Unfortunately there are several misrecitations in it. One such misrecitation was important as well as misleading; the word "inapplicable" is rendered "applicable" and quite an argument is built up on this incorrect recitation. The sentence should read, "We do not understand the rule that the master must exercise reasonable care to furnish a reasonably safe place for his servant to work, to be inapplicable when conditions are changing from time to time during the work of constructing a building."

The judgment of the Superior Court being right is affirmed.

AFFIRMED.

and the theory of the defense.

Defendant attached a copy of the lower book-

ten of this court as an exhibit to his brief. Defendant

states that several misstatements in it. One such misstate-

tion was important as well as misleading; the word "impe-

achment" is rendered "applicability" and vice versa argument is

built up on this incorrect recitation. The sentence should

read, "We do not understand the role that the master must

exercise reasonable care to furnish a reasonably safe place

for his servant to work, as he impeachment when conditions

are changing from time to time during the work of maintenance-

ing a building."

The judgment of the Superior Court being right

is affirmed.

APPEAL.

I. MULLER,  
Defendant in Error,

vs.

L. WALENSKY and H. RABINOVITZ,  
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

Defendant in error, the plaintiff below, brought a suit in the Municipal Court of Chicago upon two promissory notes against plaintiff in error as the makers thereof.

The striking of the last amended affidavit of merits, filed by leave of court, is assigned as error. It pleaded a total failure of consideration. It is difficult to understand why such a plea, permitted by the statute, was not allowed unless the court deemed the facts pleaded as insufficient in law to support such a plea. Without reciting the pleading at length it is sufficient to say that we think defendant was entitled (especially under the liberal form of pleading in that court) to make his defense upon the facts pleaded, which were in substance that the notes were given for work of a specific kind to be done that was never performed. The judgment will be reversed and the cause remanded so that defendant will have an opportunity to make his defense.

REVERSED AND REMANDED.



2011.A.352

12 - 11501

I. HUBBARD,  
Defendant in Error,  
vs.  
J. HUBBARD and W. HUBBARD,  
Plaintiffs in Error.

MR. JUSTICE J. HUBBARD  
DELIVERED THE OPINION OF THE COURT.

Defendant in error, the plaintiff below, brought a writ in the Municipal Court of Chicago upon two preliminary notes against plaintiff in error as the maker thereof. The striking of the first note was the result of a mistake, filed by leave of court, in judgment of error. It was a total failure of consideration. It is difficult to understand why such a plea, permitted by the statute, was not allowed when the court heard the first plea. It is incumbent in law to support such a plea. When raising the question of law it is not enough to say that we think defendant was entitled (apparently under the liberal form of pleading in that court) to make his defense upon the facts pleaded, which were in substance that the notes were given for cash at a specific time to be paid that was never returned. The judgment will be reversed and the issue remanded so that defendant will have an opportunity to make his defense.

REVEREND THE HONORABLE.

S. S. BORDEN COMPANY,  
Defendant in Error,

vs.

THE WESTERN UNION TELEGRAPH  
COMPANY, a corp.,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 353

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

The only question raised by this writ is as to the sufficiency of the statement of claim to support an ex parte judgment in tort rendered in a fourth class case of the Municipal Court of Chicago. It first alleges that the plaintiff (defendant in error) had purchased a car load of live poultry from Geo. M. Brooks & Co. of Milan, Tennessee, and had instructed them to ship the same to Pittsburgh, Pennsylvania. It then proceeds to state the main facts on which the plaintiff predicates its claim for damages, namely, (1) that plaintiff delivered to defendant a telegram addressed to said Brooks & Co., at Milan, Tennessee, saying: "Bill car poultry Grant street", (2) that the said defendant instead of transmitting the said telegram to Milan, Tennessee, transmitted same to Martin, Tennessee, (3) "and the said Geo. M. Brooks & Co. at Milan, Tennessee were instructed by the party receiving the telegram to ship said poultry to Grant street, Chicago", (4) and that the car was thereupon billed to Chicago and the plaintiff was compelled to have it forwarded from Chicago to Pittsburgh, causing damages complained of.

S. A. BROWN COMPANY,  
Defendant in error.

vs.

THE CHICAGO TRADING COMPANY,  
Plaintiff in error.

WRIT OF HABEAS CORPUS

IN THE CIRCUIT COURT

OF CHICAGO.

2011 A. 353

THE CHICAGO TRADING COMPANY  
PLAINTIFF IN ERROR.

The only question raised by this writ is as to

the sufficiency of the statement of claim to support an ex parte judgment in tort rendered in a fourth class case of the Municipal Court of Chicago. It first alleged that

the plaintiff (defendant in error) had purchased a car load of live poultry from Geo. W. Brooks & Co. of Milan,

Tennessee, and had instructed them to ship the same to Pittsburgh, Pennsylvania. It then proceeds to state the main facts on which the plaintiff predicated its claim for damages, namely, (1) that plaintiff delivered to defendant

a telegram addressed to said Brooks & Co., at Milan, Tennessee, saying: "Bill can poultry Grant street", (2) that the said defendant instead of transmitting the said telegram to Milan, Tennessee, transmitted same to Berlin, Tennessee, (3) "and the said Geo. W. Brooks & Co. at Milan,

Tennessee were instructed by the party receiving the telegram to ship said poultry to Grant street, Chicago", (4) and that the car was instructed to ship to Chicago and the plaintiff was compelled to have it forwarded from Chicago to Pittsburgh, causing losses complained of.



The statement of claim contains no averments from which either the nature of the business of the defendant or a duty owing from it to plaintiff may be legitimately inferred. Even if we might assume from such allegations that the defendant company was engaged in the business of transmitting telegraph messages, etc., and was in duty bound to properly deliver said message to the addressee, still we cannot in violation of the fundamental rules of pleading supply necessary allegations as to other omitted matters without which the elements of a tort are not stated nor inferable.

The damages sought to be recovered resulted, according to the averment, from instructions given by "the party" receiving the telegram. The inference is that the message was delivered to a third party at Martin who undertook to interpret it. For aught stated to the contrary, he received the message in correct form, but conveyed it to some one required to act upon <sup>it</sup> /incorrectly. Who this third party was is left to conjecture. He may have been addressee's own agent. From the language employed this inference is as reasonable as any other. If he was not defendant's agent then the proximate cause of the damages claimed was the intervening act of such third party and not the delivery by defendant of <sup>an</sup> /incorrect message to the addressee. If plaintiff intended to aver delivery of an incorrect message to addressee then there was no difficulty in so alleging instead of employing an equivocal and uncertain averment that suggests that the real facts might not justify a direct charge of negligence on the part of defendant. As stated the facts do not support an inference of defendant's negligence.



The statement of claim contains no averments

from which either the nature of the business of the defendant or a duty arising from it to plaintiff may be satisfactorily inferred. Even if we might assume from such allegations that the defendant company was engaged in the business of transmitting telegraph messages, etc., and was in duty bound to properly deliver said messages to the addressee, still we cannot in violation of the fundamental rules of pleading supply necessary allegations as to those omitted matters which the elements of a tort are not stated nor inferable.

The alleged right to be recovered resulted, according to the statement, from instructions given by the party receiving the telegram. The inference is that the message was delivered to a third party at Berlin who undertook to interpret it. For aught stated to the contrary, he received the message in correct form, but conveyed it to some one required to act upon it incorrectly. And this thing, party was in fact to construct. He may have been mistaken in his own mind. From the facts as alleged this inference is as reasonable as any other. It is not the defendant's wrong that the proximate cause of the damage claimed was the intervening act of such third party and not the delivery by defendant of the message to the addressee. If plaintiff intended to ever deliver it to another person to address then there will be difficulty in an alleged intention of neglecting an address and in certain averments that messages sent that time might not merely a direct charge of negligence on the part of defendant. As stated the facts as set forth in the statement of defendant's negligence.

Construing the statement of claim most strongly against the pleader, as is done under the general rule of pleading, which must apply as well to pleadings in the Municipal Court when the allegations are uncertain and capable of different interpretations, it reasonably supports the inference that the message was delivered in proper form but that some one other than defendant's agent was responsible for its misinterpretation.

Because the statement of claim fails to state the essential elements of a tort on the part of defendant, to say nothing about facts that raise a duty on its part to plaintiff, and to state a causal relation between defendant's delivery of the message and the damages claimed, the judgment cannot stand, (Gillman v. Chicago Railways Co., 268 Ill. 305 ) and the motion of defendant to vacate the judgment entered after default should have been allowed. The Enberg case, 271 Ill. 404, cited by defendant in error, does not undertake to overrule the Gillman case supra.

REVERSED AND REMANDED.

Generalizing the statement of claim made against the plaintiff, as is done under the general rule of pleading, which must apply as well to pleading in one category of cases as the other, it is necessary to require the plaintiff to state the substance of the facts in support of his claim, and the defendant to state the substance of the facts in support of his defense. The information thus furnished is not to be taken as a statement of the facts, but as a statement of the facts as the parties understand them. It is for the trier of fact to determine the truth of the facts as stated.

Because the statement of claim fails to state the essential elements of a tort on the part of defendant, to say nothing of the facts that raise a duty on the part of plaintiff, and to state a causal relation between defendant's delivery of the message and the damages claimed, the judgment cannot stand. (Illinois v. Chicago & North Western Ry. Co., 200 Ill. 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

REVEREND AND HONORABLE.

W. B. CRANE and O. F. CRANE,  
trading as W. B. CRANE &  
COMPANY,

Defendants in Error,

vs.

TOOKER STORAGE & FORWARDING  
COMPANY,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 354

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

This was an action in replevin in which judgment for possession and nominal damages was rendered in plaintiffs' favor. The lumber replevined was shipped by plaintiffs from Kentucky to themselves in Chicago. [The initial carrier deviated from plaintiffs' instructions in routing it by other connecting carriers than they specified, by reason of which plaintiffs declined to pay the accrued charges of transportation, whereupon the lumber was stored by the last or next to the last carrier ~~(which is immaterial)~~ with defendant, a licensed public warehouseman, who advanced the accrued railroad charges and duly notified plaintiffs of the receipt of the property and of the amount of the charges. Plaintiffs again refused to make payment and brought replevin for the goods, with the result stated.]

The sole question presented is whether defendant had a lien for such charges, it apparently being conceded that if it did the action of replevin could not be maintained without payment of them.

The basis of plaintiffs' claim is that the initial carrier's violation of its contract by misrouting



J. V. WALKER and S. T. CRANT,  
Plaintiffs in Error,  
vs.  
TUGGLES STEAMSHIP & BOAT LIVERY  
COMPANY,  
Defendant in Error.

IN SENATE  
JANUARY 10, 1902

REPORT OF THE  
COMMISSIONER OF THE GENERAL LAND OFFICE  
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE  
JANUARY 10, 1902

REPORT OF THE  
COMMISSIONER OF THE GENERAL LAND OFFICE  
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE  
JANUARY 10, 1902

This was an action to require an order of registration for possession and mineral domain was returned in which the plaintiff, however, the former defendant was ordered by the court to return to the plaintiff in which the plaintiff carrier received from plaintiff, in which the plaintiff is by order of the court to return to the plaintiff to pay the amount of which plaintiff desired to pay the amount of transportation, although the plaintiff was ordered by the court to return to the plaintiff in which the plaintiff with defendant, a license to the plaintiff, the plaintiff advanced the plaintiff to the plaintiff and the plaintiff plaintiff of the plaintiff of the plaintiff and of the plaintiff of the plaintiff. Plaintiff also refused to return to the plaintiff to the plaintiff for the plaintiff, with the plaintiff, and the plaintiff was ordered to return to the plaintiff. The plaintiff was ordered to return to the plaintiff, and a license to the plaintiff, is apparently being considered that if it did the order of registration would not be maintained without payment of them.

The basis of plaintiff's claim is that the plaintiff carrier's claim to the plaintiff of plaintiff

the shipment destroyed any lien that might otherwise exist for the accrued charges and storage. Support for this position is found in Fitch v. Newberry, 1 Doug. (Mich.) 1, but it is against the weight of authority. Patten et al. v. Union Pacific Ry. Co., 29 Fed. 590; D. & R. G. Ry. Co. v. Hill, 13 Colo. 35; Briggs v. B. T. R. R. Co., 80 Mass. (6 Allen) 246; Glover v. R. R. Co., 25 Mo. App. 369. The cases cited sustain the right of a lien for transportation charges thus incurred and advanced and hold that it is not lost by reason of the initial carrier's violation of the shipper's instructions as to routing. They support the doctrine, too, that while the initial carrier is the agent of the owner or shipper it is clothed with apparent authority to forward the goods by any ordinary or usual route.

The doctrine of special agency was invoked in some of these cases, as it is here, but they held it inapplicable and the reasoning thereon confutes the theory that succeeding carriers are bound to inquire into the existence of the initial carrier's authority in order to preserve a lien for their charges. Authorities in our own state too support the doctrine that the initial carrier and succeeding carriers or warehouseman each becomes the agent of the shipper and that there is an implied authority to pay for him the previous accrued charges of transportation. Bissel et al. v. Price, 16 Ill. 408; I. C. R. R. Co. v. Alexander, 20 id. 23; U. S. Express Co. v. Haines, 67 id. 137; Schumacher v. C. & N. W. Ry. Co., 207 id. 199.

The doctrine of special agency being inapplicable, and the right of a lien for such charges under such circumstances being clearly sustained by authority, plaintiffs could not maintain their action without first making or tendering payment of such charges. Accordingly judgment

the plaintiff destroyed any lien which might otherwise exist  
 for the goods in question and against the goods.  
 Question is then in Allen v. Meyer, 100 Cal. 100, 101.  
 but it is against the rights of authority. Allen v. M.  
v. Allen (100 Cal. 100, 101); Allen v. M. (100 Cal. 100, 101).  
v. Allen, 100 Cal. 100; Allen v. M. (100 Cal. 100, 101).  
 (100 Cal. 100); Allen v. M. (100 Cal. 100, 101).  
 cases cited therein in the right of a lien for transportation  
 charges. These cases are not authority and hold that it is not  
 lost by reason of the initial carrier's violation of the  
 contract's limitations on its liability. They support the  
 doctrine, too, that while the initial carrier is the agent  
 of the owner or shipper it is clothed with apparent authority  
 to forward the goods by any railway or water route.  
 The doctrine of special agency was invoked in  
 some of those cases, as it is here, but they held it in-  
 applicable and the reasoning thereon constitutes the theo-  
 ry that the initial carrier is bound to forward the goods  
 in favor of the initial carrier's authority in order to  
 preserve a lien for their charges. Authority in our own  
 state and courts has decided that the initial carrier  
 and succeeding carriers or warehousemen each have the  
 right of the shipper and that there is an implied authority  
 to pay the bills for the goods received charges of transportation.  
Allen v. M. (100 Cal. 100, 101); Allen v. M. (100 Cal. 100, 101).  
Allen v. M. (100 Cal. 100, 101); Allen v. M. (100 Cal. 100, 101).  
Allen v. M. (100 Cal. 100, 101); Allen v. M. (100 Cal. 100, 101).  
 The doctrine of special agency being applicable,  
 and the right of a lien for such charges under such circum-  
 stances being clearly maintained by authority, it is not  
 possible to maintain that the initial carrier is not  
 authorized to forward the goods by any railway or water route.

should be reversed and the case will be remanded with direction for a retorno unless the accrued charges, as aforesaid, and the costs of the suit are paid.

REVERSED AND REMANDED.



should be reviewed and the case will be reviewed with  
 attention for a rating unless the accused charges, as  
 stated, and the costs of the suit are paid.

REVIEWED AND REMOVED.

GEORGE T. COOKE COMPANY,  
Appellee,

vs.

E. R. STEGE BREWERY et al.,  
in the matter of the inter-  
vening petition of Vincent  
D. Wyman et al., copartners as  
Wyman, Jurgens & Carpenter,  
Appellants.

204 I.A. 371

APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of court dismissing the intervening petition of appellants filed in a suit brought on a bill of interpleader to determine the right to a certain fund which the complainant therein had paid into court.

The interveners set up in their petition that one of the defendants, Ahern, had assigned to them his interest in said fund after the issues had been formed between the defendants as to their respective rights. The record discloses that the interveners were attorneys at law and represented the assignor at a certain stage of the controversy over the fund and that one of them is his solicitor in said suit. In view of these circumstances we think the court committed no error in dismissing the petition.

AFFIRMED.

00414.371

WILLIAM T. COHEN, JR.,  
Appellant,

vs.

U. S. DISTRICT COURT at N.Y.  
In the matter of the Inter-  
vening petition of Vincent  
J. Green at al., respondents  
Green, Vincent J. Green,  
Appellants.

APPEAL FROM

DISTRICT COURT,

WEST VIRGINIA.

MR. JUSTICE TOWNE, JUDGE.  
DECIDED THE CIRCUIT OF THE COURT.

This is an appeal from an order of court dismis-  
ing the intervening petition of appellants filed in a suit  
brought on a bill of interpleader to determine the rights  
to a certain fund which the complainant had paid  
into court.

The intervenors set up in their petition that  
one of the defendants, Green, had assigned to them his  
interest in said fund after the issues had been framed be-  
tween the defendants as to their respective rights. The  
record discloses that the intervenors were assigned as  
law and represented the assignor at a certain stage of  
the controversy over the fund and that it was in his  
interest to add said. In view of these circumstances we  
think the court committed no error in dismissing the  
petition.

REVEREND.

169 - 22120

GEORGE J. COOKE COMPANY,  
a corporation,  
Appellee,

vs.

E. R. STEGE BREWERY et al.,  
On appeal of PATRICK AHERN,  
Appellant.

204 I.A. 372

APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

The Geo. J. Cooke Company filed a bill of interpleader to require the defendants, E. R. Stege Brewery and Patrick Ahern, to interplead and determine between themselves which was entitled to the rent of certain premises leased to and occupied by the Cooke Company, the rent having been demanded from it by each of the defendants. The Cooke Company tendered and was ordered to pay the rent into court, and the defendants were directed to interplead. Each filed an answer setting up his claim to said rents. The Brewery's claim is predicated upon a sheriff's deed issued upon an execution sale of said premises under a judgment for \$1605.38 recovered by it against said Ahern. The latter's claim is predicated on the facts that he was the lesser, that at the time of the execution sale he owned an estate of homestead in the premises and that said sale was void because of the existence of such homestead, and because it was not then set-off to him and because the equity of redemption in the premises was not at that time nor since worth \$1,000. Ahern also filed a cross bill praying that said sheriff's deed be decreed a cloud upon his title and that the same be removed. In





addition to the issues raised by defendants' interpleading, issues were formed on the cross bill. On cross complainant's motion a reference was made to a master in chancery to take testimony and report his conclusions of fact and law. The only real issue of fact presented either by the answers or under the cross bill was whether Ahern had abandoned his homestead right. It is conceded, however, that a homestead estate had already been adjudicated in his favor in the suit of Dooley v. Ahern, (191 Ill. App. 140,) to which the Brewery was a party. The only proofs offered related to that issue and the value of the equity of redemption. The master's report sustained Ahern's claims to a homestead right and the value of the equity of redemption, and recommended the setting aside of the execution sale. No exceptions were filed, and the findings were confirmed by the decree. Before entry thereof, however, Ahern moved the court for leave to dismiss his cross bill. The motion was denied and it was decreed that the sale and deed be set aside, that the satisfaction of the execution be vacated and the judgment restored, and that the money left in the hands of the clerk, \$561.55, be paid over to the Brewery and applied upon said judgment. By a previous order the court had directed the clerk to pay the master's fees of \$188.45 from said funds. The decree further provided that the master's fees be not taxed against any of the parties and that the other costs be taxed against Ahern. Ahern appealed from such decree.

The main question is whether or not the court properly disposed of the fund or rents in controversy. The legal right to the rent from the premises was the only question at issue. It followed from the court's finding of

addition to the issues raised by defendant's intervention,  
issues were raised on the cross bill. On cross complainant's  
motion a reference was made to a master in chancery to take  
testimony and report his conclusions of fact and law. The  
only real issue at first presented either by the master or  
about the cross bill was whether there had been a bona fide  
purchase right. It is contended, however, that a bona fide  
purchase estate had already been adjudicated in his favor in the  
suit of Moyle v. Ahern, (191 Ill. App. 140) to which the  
Gravely was a party. The only points offered related to  
that issue and the value of the equity of redemption. The  
master's report sustained master's claim to a bona fide  
right and the value of the equity of redemption, and recom-  
mended the setting aside of the execution sale. No excep-  
tions were filed, and the findings were confirmed by the  
court. Before entry thereof, however, Ahern moved the  
court for leave to dismiss his cross bill. The motion was  
granted and it was decreed that the sale and deed be set  
aside, that the satisfaction of the execution be vacated  
and the judgment reversed, and that the party left in law  
possession of the property, \$500.00, be paid over to the Gravely  
and nothing more said thereon. By a previous order the  
court had directed the clerk to pay the master's fees of  
\$100.00 from said funds. The court further provided that  
the master's fees be not taxed against any of the parties  
and that the other parties be taxed against Ahern. Ahern  
appealed from such order.

The main question is whether or not the court  
properly allowed of the fund as being in controversy. The  
issue then to the point from the premises was the only  
question at issue. It followed from the court's finding of



a homestead estate in Ahern and that the equity of redemption was not worth \$1,000, that the sheriff's deed to the Brewery was void. This does not seem to be questioned. No right to the rents, therefore, was acquired thereby. Unless, therefore, the Brewery had an equitable lien thereon the court wrongfully applied the fund in the court's hands to a partial payment of the Brewery's judgment and improperly taxed the costs against appellant Ahern.

It is true, as was said in Chandler v. Morey, 195 Ill. App. 596, that where defendants to a bill of interpleader answer, the court may so shape its decree as to do complete equity between the parties, and "may fasten upon the fund in controversy any equitable lien or trust which one of the parties may have established, though the proprietary legal title and ownership belonged to the other." But there was neither any averment of fact in the pleadings to support an equitable lien to the fund on the part of the Brewery nor proof to establish one. Certainly none arose from the void deed or from the mere existence of the judgment. The sale and deed being void and the Brewery establishing no equitable lien it follows that Ahern, as the lesser and landlord of the premises, was entitled to collect the rent therefrom.

In that view of the case we need not decide whether the rent was an incident to the homestead, nor consider whether the court would have been justified in applying it to a partial satisfaction of the judgment on granting relief under the cross bill, for it is conceded that the court erred in not dismissing the cross bill. With the cross bill eliminated, there were no equitable rights for adjustment, and no question to adjudicate except which party was legally entitled to the rent. But were the cross bill to stand we fail to see upon





what equitable theory the rents could be appropriated to satisfy said judgment.

Appellant contends that the bill of interpleader should have been dismissed because no proof was adduced in support of the main facts upon which it rested. None was necessary, for its averments were either admitted or not denied, thus leaving unquestioned complainant's right to file it.

It is also urged that said bill should have been dismissed for want of a necessary party, it appearing from the lease attached as an exhibit thereto, that the lessors of the premises were Ahern and said Dooley, whose interest was that of a mortgagee. The question whether Dooley should have been made a party was not raised below and is not, as the record stands, necessarily presented here. The undenied allegation of the bill was that complainant leased the premises from, and attorned to, Ahern and there are no averments in the pleading or proof in the record to the contrary. The decree will, therefore, be reversed and the cause remanded for entry of a decree in conformity with this opinion.

REVERSED AND REMANDED.



204 I.A. 374

B. A. L. THOMPSON, Jr.,  
Defendant in Error.

vs.

LUCIUS J. M. MALMIN and  
LAURA U. MALMIN,  
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

Defendants below (plaintiffs in error) were denied a change of venue. Their petitions therefor brought them within the provisions of the statute and were heard on the day after they were filed and notice thereof given. To justify the court's action defendant in error cites Huston v. Wood, 263 Ill. 381, and Glos v. Gannett, 219 id. 213, holding that the reasonableness of the notice is a matter left to the discretion of the court. It does not appear from the record, nor do the facts support the inference, that the court denied the motion on the ground of want of reasonable notice. While the notice was served for two o'clock on the day the petitions were filed the motions were heard the following day. The parties were represented and record discloses no circumstances to indicate that a longer notice was required or usually given, or that there was any complaint of insufficient notice. The court can not arbitrarily deny a change of venue when one brings himself within the provisions of the statute.

It also appears that issues of fact were raised by the pleadings and that the court entered judgment without hearing evidence. The judgment will be reversed and the



478.4.1.100

O. A. L. THOMPSON, Jr.,  
Defendant in Error,

vs.

RODOLPH J. W. MAHLE and  
LAWA U. MAHLE,  
Plaintiffs in Error.

PRESENT TO  
JUDICIAL BOARD  
OF THE COURT

RECEIVED THE CLERK OF THE COURT  
AT THE CLERK'S OFFICE

Plaintiffs below (plaintiffs in error) were as-  
sued a change of venue. Their petitions therefor brought  
them within the provisions of the statute and were heard  
on the day after they were filed and notice thereof given.  
To justify the court's action defendant in error filed  
Wright v. Ford, 203 Ill. 501, and Ellis v. Bennett, 218 Ill.  
115, holding that the responsibility of the action is ap-  
portioned to the plaintiff of the court. It does not  
appear from the record, nor do the facts suggest the in-  
ference, that the court denied the motion on the ground of  
want of reasonable notice. While the motion was served  
for two o'clock on the day the petitions were filed the  
motions were heard the following day. The parties were  
represented and record disclosed no circumstances to indicate  
that a longer notice was required or usually given, or that  
there was any complaint of insufficient notice. The court  
did not arbitrarily deny a change of venue when one belongs  
naturally within the provisions of the statute.

It also appears that issues of fact were raised  
by the pleadings and that the court entered judgment without  
hearing evidence. The judgment will be reversed and the

cause remanded.

REVERSED AND REMANDED.

• Богословный словарь

• REVIEW •

204 I.A. 375

In the Matter of the Petition of  
FLORENCE FERGUSON LEONARD, to be  
Discharged under the Insolvent  
Debtors Act,

Appellee,

vs.

ISA D. LEONARD, Judgment Creditor,  
Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the county court releasing upon her petition a judgment debtor from the custody of the sheriff under a writ of capias ad satisfaciendum issued upon a judgment in tort against her wherein malice was the gist of the action. The court's order was based on the theory that the capias was improperly issued without an affidavit, such as is required by section 62, chap. 77, Hurd's Stat. 1913, p. 1500, following the decision of this court in Marshall Field & Co. v. Freed, 191 Ill. App. 621. But that decision was reversed by the Supreme Court in 268 Ill. 558, the court holding that such an affidavit is not required when the judgment is for a tort. As malice was the gist of the action the county court had no authority to enter the order. The order releasing the petitioner will, therefore, be reversed and the cause remanded with directions to vacate such order and dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.



2011A.375

ALBANY, N.Y.  
COUNTY COURT  
DECEMBER 10, 1901

In the Matter of the Estate of  
JAMES HENRY LEE, deceased,  
Decedent, vs.  
The People of the County of Albany,  
Respondent.

THE PEOPLE OF THE COUNTY OF ALBANY,  
vs.  
JAMES HENRY LEE, deceased.

This report is made in order of the county court  
relating upon the petition of James Henry Lee from the  
custody of the sheriff under a writ of habeas corpus  
returning against him a judgment in favor of the county  
court. The court's  
order was based on the theory that the writ was improperly  
issued without an affidavit, which as is required by section  
15, Chap. 17, Code of Civil Procedure, following the  
decision of this court in People v. Lee, 100 N.Y.  
191 111. 1901. But that decision was reversed by the  
supreme court in 1901 111. 1901, the court holding that such  
an affidavit is not required when the judgment is for a  
fine. It is held now that if the writ is issued for  
the purpose of releasing the prisoner to enter the county  
court, the writ is not valid, and the county court  
must not release him. Therefore, the writ is not valid  
and the county court must not release him.

THE OHIO SALT COMPANY,  
a corporation,  
Defendant in Error,

vs.

THE BALTIMORE & OHIO RAILROAD  
COMPANY, a corporation,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 376

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

This was a suit brought to recover damages for the loss of a shipment of salt delivered by the plaintiff below to the defendant Railroad Company as the initial carrier at Rittman, Ohio, for transportation to Camden, N. J., via Cleveland, Ohio. After a trial before the court without a jury, judgment was rendered against the Railroad Company for \$183.50.

We shall disregard questions relating to the pleadings and consider the case with reference to the theory of liability on which the case was evidently tried, and whether the court applied correct principles of law to the evidence in the case.

The car in question reached Cleveland about 7 P. M. in the evening when it was placed in the company's yards where cars were received for classification and transfer. During the night and following morning the Cuyahoga river rose steadily and flooded the yards. A clear preponderance of the evidence showed that the flood was of unusual proportions, unprecedented, and such as could not have been reasonably anticipated by the railroad people. Had the conditions been normal the car could have

THE CINCINNATI & OHIO RAILROAD COMPANY,  
a corporation,  
Defendant in Error.

vs.

THE CINCINNATI & OHIO RAILROAD COMPANY,  
a corporation,  
Plaintiff in Error.

ORDER TO

RECEIVED BY

OF CINCINNATI.

304 I.A. 376

RECEIVED THE CLERK OF THE COURT.  
RECEIVED THE CLERK OF THE COURT.

This was a suit brought to recover damages for the loss of a shipment of rail delivered by the plaintiff to the defendant railroad company as the initial carrier at Cincinnati, Ohio, for transportation to London, N. Y., via Cleveland, Ohio. After a trial before the court about a year, judgment was rendered against the railroad company for \$183.00.

We shall disregard the claims relating to the pleadings and consider the case with reference to the theory of liability on which the case was originally tried, and without the least applied correct principles of law to the evidence in the case.

The car in question reached Cleveland about 7 P. M. in the evening when it was placed in the company's yards where it was received for classification and transfer. During the night and following morning the Cuyahoga River rose steadily and flooded the yards. A great proportion of the evidence shows that the flood was of unusual proportions, unprecedented, and such as could not have been reasonably anticipated by the railroad company. The conditions were such that the railroad company was not liable for the loss of the car.



been transferred about 11 P. M., though in the ordinary course of events it would have been made about 6 o'clock the next morning. Owing to the heavy rains and steady rise of the water into the yards it became necessary to assemble all the cinders, refuse, slag, etc., to repair the track as soon as conditions would permit in order to avoid delay of traffic, and practically all the engines so far as they could be used were employed during the night in the repair work. Under the circumstances it was impossible to get all the cars out of the yards to higher points or to transfer them to other tracks. The water had not been known to rise high enough before to damage the contents of cars in the yards. The preponderance of the evidence, therefore, was against plaintiff's theory that the damages ensued from unreasonable delay on the part of the defendant, and supported the latter's theory that the loss was occasioned solely by the flood, an act of God.

Defendant in error relies on the theory applicable in this state to intrastate commerce that where the negligence of the carrier is a contributing cause of the damage it cannot escape responsibility notwithstanding the act of God, and cites cases to that effect. But even if the facts justified holding the company negligent by reason of delay, still it being an interstate shipment the rule of liability laid down in the Federal Courts must govern. It is settled law that since the passage of the Carmack Amendment to the Interstate Commerce Act "the special regulations and policies of particular states upon the subject of the carriers' liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded." (Charleston & W. C. R. Co. v. Varnville Furniture



best transmitted about 11 P. M., though in the ordinary course of events it would have been about 6 P. M. The first sound, being to the heavy rain and steady rise of the water into the yard is heard, however, is usually all the same, though, when, 6 P. M., to 10 P. M. the sound is heard as something would be heard in the ordinary of the rain, and the sound is all the same as for as they could be used were employed during the night in the night work. In the afternoon it was impossible to get all the water out of the yard as before, and to transfer from the other side. The water had not been shown to the high ground before to transfer the water, of some in the yard. The progress of the water, however, was not the same as the water that the water, which from the water, which in the yard of the island, and suggested the water's theory that the water was contained in the water, in the yard, in the yard.

Co., 237 U.S. 597; Adams Express Co. v. Croninger, 236 U. S. 491; Gamble-Robinson Co. v. Un. Pac. R. R. Co., 262 Ill. 400; P. P. U. Ry. Co. v. Corning & Co., 266 id. 515.) When the Federal government assumed exclusive control of interstate commerce it was/with the undoubted purpose among other things of maintaining uniformity of obligation and liability on the part of the carriers. Passing on the question of the carrier's liability for an interstate shipment in Cincinnati, New Orleans & Texas Ry. Co. v. Rankin, 241 U. S. 319, the court said:

"The shipment being interstate, rights and liability of the parties depend upon acts of Congress, the bill of lading, and common law rules as accepted and applied in Federal tribunals." (326)

The uniform bill of lading, under which the shipment moved provided:

"No carrier or party in possession of any of the property herein described shall be liable for any loss thereof, or damage thereto, or delay caused by the act of God."

The federal rule of liability where the carrier seeks to be excused for non-delivery of goods caused by the act of God, is stated in Railroad Co. v. Reeves, 77 U. S. 176, as follows:

"Where the proximate cause of damage to goods in the hands of a carrier is an act of God, the carrier is excused from liability, although his own negligence or delay may have contributed to the loss or damage as a remote cause thereof."

(See also St. L. I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223; The Indrapura, 171 Fed. 929, and Empire State Cattle Co., et al. v. A. T. & S. F. Ry. Co., 135 Fed. 135.)

The facts in the last cited case are very like those at bar and what was said there is applicable here, namely, "that the direct proximate cause of the loss and

100. 100 U.S. 1007; United States v. Franklin, 100

U.S. 401; United States v. W. H. R. Co.

100 U.S. 401; United States v. W. H. R. Co., 100 U.S.

401. (1) When the Federal Government exercises exclusive

control of the water power it has the exclusive right

among other things of maintaining navigation of the water

and liability on the part of the carrier. Liability on the

question of the carrier's liability for an interstate ship-

ment is determined by the United States v. W. H. R. Co.

100 U.S. 401, and other cases.

"The exclusive right of navigation, rights and  
liability of the water power, and the right of control,  
the right of liability, and the right of control,  
and the right of control, and the right of control."

The United States is liable, under the ship-

ment laws provided:

"The carrier or owner in possession of any of  
the property herein described shall be liable for any  
loss thereof, or damage thereto, or delay caused by  
the act of God."

The Federal rule of liability under the carrier

cases is to be construed for non-liability of goods covered by the

act of God, is stated in United States v. W. H. R. Co.

100, as follows:

"Where the Government owns of property in goods  
in the hands of a carrier in an act of God, the carrier  
is exempt from liability, although his negligence  
is shown, and he is not liable for the loss of goods as  
a common carrier."

(See also United States v. W. H. R. Co., 100 U.S. 401.)

100 U.S. 401; United States v. W. H. R. Co., 100 U.S. 401, and United

States v. W. H. R. Co., 100 U.S. 401, 100 U.S. 401, 100 U.S.

401.)

The facts in the case cited are very like

those of the case cited in the preceding note,

namely, "that the Government owns of the land and

damage was an unprecedented and unexpected flood and attendant disaster that came wholly without anticipation on the part of the defendant company."

The court, therefore erred in refusing the propositions of law which stated the federal rule as to liability and in not finding the Railroad Company not guilty. Its judgment will be reversed with a finding of fact.

REVERSED.



the part of the Government.

The court, therefore, ruled in favoring the  
proposition of law which stated the Federal rule as to  
liability and in not finding the Federal Government not  
liable. The finding will be reversed with a finding of

228 - 22181

FINDING OF FACT.

We find that the damage to the shipment in question was caused by a flood and not by a delay in transportation and that the proximate and sole cause of the loss was an act of God.

1911 - 1912

REPORT OF 1911

We find that the damage to the equipment in  
question was caused by a flood and not by a defect in  
construction and that the proceeds of the sale of the  
equipment were not of use.

ELIZABETH BAAB,  
Defendant in Error,

vs.

ROYAL LIFE INSURANCE CO. OF  
CHICAGO, a corporation,  
Plaintiff in error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 378

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

The plaintiff in error issued a policy belonging to the class of industrial insurance to one Martin J. Hickey insuring his life in consideration of a weekly premium of 25¢ for the sum of \$120 and providing for payment thereof "unto the executors or administrators of the insured," unless settlement shall be made under the following provisions:

2. FACILITY OF PAYMENT. "The Company may make any payment provided for in this policy to the executor, administrator, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, for his or her burial, and the production by the Company of a receipt signed by any or either of said persons shall be conclusive evidence that all claims under this policy have been fully satisfied."

It also contained the following provision:

3. POLICY SOLE CONTRACT. "This policy contains the entire contract between the parties in question."

After Hickey's death, defendant in error, to whom he delivered the policy, produced the same to the Company, but the latter made a settlement therefor for less than its face value with the administrator, whose receipt for the amount paid was produced in evidence.



Department in error,

vs.

ROYAL LIFE INSURANCE CO. OF  
CHICAGO, a corporation,  
Plaintiff in error.

ORDER TO

RECEIVED

ON RECORD.

2041A.278

RECEIVED THE OFFICE OF THE COURT  
JAN. 10. 1910. 11. 10. 1910.

The plaintiff in error issued a policy belonging  
to the class of industrial insurance for one year in  
policy insuring his life in consideration of a weekly  
premium of \$25 for the sum of \$100 and providing for pay-  
ment thereof "until the expiration or administration of the  
insured," unless settlement shall be made under the follow-  
ing provisions:

2. POLICY OF - "The Company may  
make any payment provided for in this policy to the  
beneficiary, administrator, husband or wife, or any re-  
sulting child or descendant by marriage of the in-  
sured, or to any other person appearing to be entitled  
thereto to the extent of having insured an-  
nuities on behalf of the insured, for life or for period,  
and the production by the company of a receipt signed  
by any or either of said persons shall be conclusive  
evidence that all claims under this policy have been  
fully satisfied."

It also contained the following provision:

3. POLICY - "This policy con-  
tains the entire contract between the parties in-  
volved."

After taking a death, defendant in error, in error  
he delivered the policy, produced the same to the company,  
and the latter made a settlement therefor for less than the  
face value with the administrator, whose receipt for the

The application for the policy was on a printed form. It contains no provision for naming a beneficiary, but at Hickey's request the agent wrote on the margin thereof "Beneficiary, Elizabeth Baab."

In the case of Sheridan v. Prudential Ins. Co. of America, 128 Ill. App. 519, where an adjustment of the policy was made by the insurance company in accordance with provisions for payment identical with those above quoted, this court, following the decisions in Thomas v. Prudential Ins. Co., 148 Pa. 594, Brennan v. Prudential Ins. Co., 32 Atl. Rep. (Pa.) 1042, Metropolitan Life Ins. Co. v. Schaffer, 50 N. J. Law, 72, and other cases there cited, held that a settlement with the Company under such provisions discharged it from further liability. What was there said is applicable to the facts of this case and the policy under consideration. Whether the administrator holds the fund for the benefit of plaintiff in error as the beneficiary is not before us for decision. If she has a vested interest as beneficiary, we think, as stated in the Schaffer case, supra, that she holds it subject to said provision for payment and that the Company was discharged from further liability by payment in accordance therewith.

Reference is made in the brief for defendant in error to the case of Smith v. Metropolitan Life Ins. Co., 222 Pa. 226, where it was held that similar clauses in a like policy would not be permitted to over-ride rights fixed by the policy. There was no question in that case about a designated beneficiary, and here the policy is expressly made payable "unto the executor or administrator" unless there is a settlement as therein provided. It was both paid to and settled with the administrator in accordance with the

The application for the policy was on a printed form. It contained no provision for naming a beneficiary, but at Victoria's request the agent wrote on the bottom thereof "Beneficiary, Elizabeth Jones."

In the case of Victoria v. Metropolitan Life Ins. Co., 100 N. D. 111, 1917, 1918, where no assignment of the policy was made by the insurance company in accordance with provisions for payment identical with those above stated, this court, following the lead taken in Metropolitan Life Ins. Co. v. Victoria, 100 N. D. 111, 1917, 1918, Victoria v. Metropolitan Life Ins. Co., 100 N. D. 111, 1917, 1918, and other cases there cited, held that a settlement with the company under such provisions charged it from further liability. That was there said in application to the facts of this case and the policy under consideration. Whether the administrator holds the fund for the benefit of plaintiff in error as the beneficiary is not before us for decision. It has a vested interest as beneficiary, we think, as stated in Metropolitan Life Ins. Co. v. Victoria, 100 N. D. 111, 1917, 1918, and that the company is subject to suit for payment and that the company was discharged from further liability by payment in accordance therewith.

Reference is made in this brief for discussion in error to the case of Metropolitan Life Ins. Co. v. Victoria, 100 N. D. 111, 1917, 1918, where it was held that either clause in a life policy would not be permitted to over-ride rights fixed by the policy. There was no question in that case about a designated beneficiary, and here the policy is expressly made payable "into the account or administrator" unless there is a settlement as therein provided. It was held said to and settled with the administrator in accordance with the

provisions thereof. As it contained "the entire contract between the parties" to it, a proper application of the law required the court to enter a judgment for the defendant as requested. The judgment will be reversed.

REVERSED.





SAMUEL C. PIRIE, JOHN T. PIRIE,  
GORDON L. PIRIE, JOHN W. SCOTT,  
ROBERT L. SCOTT, FREDERICK H.  
SCOTT, ANDREW McLEISH and BRUCE  
McLEISH, copartners doing business  
under the firm name and style of  
CARSON, PIRIE, SCOTT & CO.,

Plaintiffs in Error,

vs.

ETHEL HORWICH,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 379

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error obtained a judgment in the Municipal Court against defendant in error on which an execution was issued and returned, marked "No property found and no part satisfied." Thereafter the judgment debtor was cited into court under section 64 of the Amended Municipal Court Act for examination concerning her property. She appeared at the time specified but failed to appear at the times to which continuances for a hearing were taken. Thereupon the court entered an order for a rule upon her to show cause why she should not be held in contempt of court. On the hearing thereof she appeared and objected to the legality of the supplemental proceedings for the reason that the bailiff had made no personal demand on her under the execution. Whereupon the court discharged the respondent and refused to vacate the order on the motion of the plaintiffs in error. In that the court erred. As stated in Freeman on Executions, Vol. 3, sec. 401, (3 Ed.) unless there is an entire absence of jurisdiction in commanding the judgment debtor to appear in supplemental proceedings,



the order must be obeyed and "the defendant can not obtain a vacation of the order by showing that the judgment or execution was irregular or erroneous." Cases are there cited relating to analogous proceedings under the New York statutes. The judgment debtor could not attack the return of the execution writ collaterally or thus purge herself from contempt for failure to comply with an order which the court had the jurisdiction to enter. The judgment will be reversed and the cause remanded for proceedings in conformity with this opinion.

REVERSED AND REMANDED.



The court may be asked and the defendant can not object  
to a variation of the order of showing that the defendant or  
petitioner was injured or oppressed. There are three  
direct rulings to maintain protection under the law for  
petitioner. The defendant's right would not be taken  
at the conclusion of the trial or the judge's decision  
from complaint for failure to comply with an order which  
the court had the jurisdiction to enter. The judgment  
will be reversed and the cause remanded for proceedings  
in conformity with this opinion.

REVEREND AND HONORABLE

2683

MINNIE RONDEL et al.,  
Plaintiffs in Error,

vs.

QUIN O'BRIEN et al.,  
Defendants in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

204 I.A. 380

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, who were the complainants below, filed a bill in equity against Quin O'Brien, William E. Hatterman both individually and as executor of the last will and testament of Friedrich Schramm, deceased, William D. Johnson, Elizabeth Stern, Frank Schramm, William Schramm, Herman Schramm, Ella Reetz, Josephine Frech, and George F. Gartung, wherein it was sought primarily to obtain an accounting for certain funds alleged to have been wrongfully withheld from the complainants. Service was had upon defendants O'Brien, Hatterman and Johnson, the latter being the attorney representing the said Hatterman while acting as executor under the said will, and so far as this writ of error is concerned, they are the only defendants interested here.

Briefly stated, the facts as related in the verified bill of complaint, are substantially as follows:

The said Friedrich Schramm died on December 29, 1906, leaving no direct heirs surviving him. Upon his death, defendant Elizabeth Stern, then known as Elizabeth Schramm, claimed to be his widow by virtue of an alleged marriage to the deceased, a short time before his death. The last will and testament, which was dated December 21,

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

AT 11:47 AM, MAY 19, 1964, THE FOLLOWING MESSAGE WAS RECEIVED FROM THE NEW YORK OFFICE OF THE FBI:

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There are no returns on the above listed stock.

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CONFIDENTIAL

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THE UNIVERSITY OF CHICAGO PRESS

המחיר של המכשיר הוא 1,200 ש"ח, כולל מע"מ.

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beginning on 70 percent in early 1960 and as late as 1961.

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1906, devised and bequeathed all the decedent's estate, both real and personal, consisting of several parcels of land, and upwards of \$20,000 in personal property, to the said Elizabeth Stern, and named the defendant Hatterman as executor.

Subsequently, certain but not all of the collateral heirs, and one George F. Gartung, a son-in-law of the deceased, brought proceedings not only to contest the said will but also to annul the alleged marriage between the deceased and the defendant Elizabeth Stern, on the ground of insanity of the deceased at the time of the execution of the said will and the consummation of the said marriage.

Prior to the institution of these proceedings, the said contesting heirs and Gartung, who were represented by the defendant O'Brien as their attorney in said proceedings, had entered into an agreement with the said O'Brien, by the terms of which the latter was to pay all the expenses of the said litigation, and if successful, he was to receive one-half of whatever property was recovered thereby.

Pursuant thereto, the said O'Brien, on February 29, 1908, on behalf of the said contestants, filed a bill of complaint to assail the validity of the last will and testament of the said Friedrich Schramm, deceased; and on July 10, 1908 he filed another bill to contest the validity of the marriage of the said Friedrich Schramm to the said Elizabeth Stern, and praying for an annulment thereof. No trial was had on the first bill, but on the second a trial was had before a court and jury which terminated in a verdict for the complainants. No decree, however, was entered, but the parties compromised their differences by way of a settlement agreement, dated September 22, 1910, whereby the said contestants were to receive all the personal





property of the said Schramm estate, provided it aggregated more than \$21,000, and the said Elizabeth Stern was to receive all the real property of the said estate and a certain burial lot.

Pursuant to the said settlement agreement, the defendant Hatterman, as executor, assigned and turned over upwards of \$21,000 to said O'Brien, a part of which the latter distributed among the various contestants; and the real property was conveyed to the said Elizabeth Stern free and clear of any incumbrances arising out of the pendency of the two foregoing suits; and subsequently the two said suits were dismissed.

On December 14, 1910, the said Hatterman presented to the Probate Court of Cook County his final account and report as executor of the said estate, and requested that same be approved and that he be discharged as executor. The said Elizabeth Stern repudiated the aforesaid settlement agreement and appeared in said court and objected to the final account, later filing written objections thereto. Subsequently hearings were had thereon but the said final account was never approved in the Probate Court. On September 26, 1911 the said Hatterman filed a bill of complaint in the circuit court against the said Elizabeth Stern and other defendants, praying for an injunction restraining the said Elizabeth Stern from objecting to his said final account, and that the said agreement of settlement entered into between the said contestants and Elizabeth Stern be declared a good and binding obligation.

On November 3, 1911 the said Hartman filed a petition in the said suit, alleging a contract between himself and the said Elizabeth Stern, whereby the latter agreed to pay him \$1,500 for his attorney, for representing him





and the estate in the various suits, and that \$300 had already been paid to defendant Johnson, his attorney. The petition also prayed that an order be entered directing the transfer of the said estate from the Probate court to the circuit court, and sought an approval of his final account as executor. Accordingly, an order was entered, pursuant to which the said estate was transferred to the circuit court for administration, and later a decree was entered, affirming the said settlement agreement and decreeing that the said attorney for Hatterman have a lien for the balance of his fee on the real estate which the said Elizabeth Stern received from the said estate. This decree was entered on May 4, 1912.

The bill of complaint filed herein charges, inter alia, that the said O'Brien has not accounted for all the moneys recovered from the said estate, and further, that the said Hatterman has failed to account for the full amount of personal property which came into his possession as executor; and prays that the said decree of May 4, 1912 entered by the circuit court be declared null and void as to the complainants herein, for want of jurisdiction of the court over their persons, and that the aforesaid settlement agreement be declared to be a good and binding contract and obligation; that complainants be allowed to file objections to the said final account and report of Hatterman, and that defendants O'Brien, Hatterman and Johnson be ordered to account to complainants for all moneys and personal property belonging to the said estate, and that should the court be of the opinion that complainants are barred from objecting to the said final account and report of the said Hatterman, defendant O'Brien be obliged to account for and pay to them the amount of money and property lost by reason of his alleged negligence to advise them of their rights in the premises.





To the amended bill of complaint demurrers were filed by defendants O'Brien, Hatterman, (both individually and as executor), and William D. Johnson, all of which upon hearing were sustained, and the said bill of complaint was subsequently dismissed by the court for want of equity. One of the grounds set forth in the demurrers of defendants O'Brien and Hatterman, was multifariousness.

Complainants contend on this writ of error, that their said bill of complaint is not obnoxious to demurrer for this or any other reason, and that the court erred in sustaining the said demurrers and dismissing the bill.

A bill is multifarious which seeks relief in matters arising out of independent and distinct items, the improper consolidation of which would lead to confusion. (Gage v. Parker, 103 Ill. 528.) Multifariousness may be defined in various other ways, but in each instance the question whether or not a bill is subject to this objection depends upon the particular facts in the case, and therefore no rule, however comprehensive, can serve as an infallible guide in determining this question. It rests in the sound discretion of the court to say whether or not a bill is multifarious. North American Ins. Co. v. Yates, 214 Ill. 272.

Complainants lay particular stress upon the fact that their bill of complaint has but one purpose, viz., to secure what is due them under the aforesaid settlement agreement.

It will be noted from the bill of complaint contained in the record now before this court, that complainants' cause of action against defendant O'Brien is based upon their agreement of February 25, 1907, whereby he was to receive as his fee, one-half of any personal property recovered from the said estate, the other half to go to the





complainants. Their principal grievance against defendant O'Brien now is, that he has failed to surrender to them their full share of the property recovered.

While the common source of all of the complainants' claims was the aforesaid settlement agreement, yet the claims themselves are separate and distinct, - the one against defendant O'Brien being based upon a special agreement between the parties, contingent upon the successful culmination of the litigation therein contemplated, while that against defendants Hatterman and Johnson is predicated upon the settlement agreement itself. If the said Hatterman as executor has failed to account for all the property that came into his hands as such, upon proper showing such an account could be required in the probate court or in the proceedings in the circuit court, to which the administration of the said estate had been transferred. But the relief sought in this bill against the said Hatterman is clearly of a different nature and is separate and distinct and entirely independent of the relief sought against the defendant O'Brien.

Manifestly, therefore, the several claims herein sought to be litigated are separate and distinct in their nature and have no relation or dependence upon one another, and for this reason the bill must be held to be multifarious. Story's Eq. Pl. sec. 271.

The bill of complaint further alleges that "if the court should be of the opinion that they (complainants) are precluded from objecting to said final account and report of said executor, then they pray that said Quin O'Brien may be required to account to them for the various sums of money and property lost to them by reason of his negligence, while acting in the capacity of their solicitor, and also while acting as their trustee under said agreement, of





settlement, and in not requiring said William E. Hatterman to account for and assign and turn over to him for them all of the money and personal property which, under and by the terms of said agreement, belonged to them."

Assuming that damages would lie, as prayed for in the bill, clearly such a claim would have no relation to those hereinabove mentioned.

In view of the foregoing, we are of the opinion that the bill of complaint is multifarious, for which reason the court properly sustained the respective demurrers thereto. Accordingly the decree of dismissal will be affirmed.

AFFIRMED.

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HANNIBAL TRUST COMPANY of  
Hannibal Mo., a corporation,  
Appellee,

vs.

N. LANG and IDA LANG,  
Appellants.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 395

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

The judgment herein complained of was entered on a directed verdict in favor of the plaintiff (appellee).

Plaintiff's claim was based upon two certain promissory notes executed by defendants and payable to the World Manufacturing & Specialty Company, a corporation engaged in the manufacture of stamp vending machines, hereinafter referred to as the company.

During April, 1912, plaintiff entered into an agreement with the company, by the terms of which it agreed to purchase from said company, customers' notes representing part of the purchase price of stamp vending machines. This agreement also provided that the company would sell and assign to the plaintiff at a discount of six per cent (6%), the notes received by the company on account of the purchase price of stamp vending machines thereafter to be sold by it, to the amount of \$10,000. It further provided that in case of failure by the makers to pay any of the notes at maturity <sup>in</sup> or the event any dispute arose from any claim of the makers of any of the notes so transferred, the company would at once receive back such notes and reimburse plaintiff to the extent of the moneys advanced; and that, by way of further protection to the plaintiff, the company agreed to



Plaintiff's claim was based upon two certain  
 primary notes executed by defendant and payable to the  
 order of Plaintiff, a corporation.  
 The first note was dated April 1912, and the second  
 note was dated May 1912.

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Plaintiff's claim was based upon two certain

The first note was dated April 1912, and the second

note was dated May 1912.

Plaintiff's claim was based upon two certain

primary notes executed by defendant and payable to the

order of Plaintiff, a corporation.

The first note was dated April 1912, and the second

note was dated May 1912.

Plaintiff's claim was based upon two certain

primary notes executed by defendant and payable to the

order of Plaintiff, a corporation.

The first note was dated April 1912, and the second

transfer and deliver to the plaintiff collateral securities, with power in the plaintiff to pledge or sell same if necessary, in order to fully indemnify and repay to plaintiff any loss incurred or sustained on account of the purchase of any of said notes.

It was alleged by way of defense, that there was a breach of warranty, also a failure of and fraud in the consideration, and that plaintiff was not the real owner of the notes in question but held them only for collection; that if it acquired them as purchaser, it was not a holder in due course within the meaning of section 52 of the Negotiable Instruments act, ch. 98, R. S. of Illinois.

Upon the trial, plaintiff introduced the notes in evidence and then rested, after which certain evidence was introduced on behalf of the defendants, consisting of two depositions and the testimony of one Oscar F. Foss, a former officer of the company, and of Nettie Lang, one of the defendants; the said depositions being read in evidence on behalf of both parties.

The deposition of V. H. Whaley, who was secretary of the plaintiff, was to the effect that the notes were bought from the company shortly after August 17, 1912; that neither the plaintiff nor any of its officers knew anything of the alleged infirmities; that they paid the face value of the notes, less six per cent (6%) discount therefor. He further testified that under the contract between plaintiff and the company other notes had been purchased, aggregating about \$17,000; that of the notes purchased, certain of them were not paid at maturity and were charged back to the company; that this was not done until some time after the notes herein sued upon had been purchased.





The testimony of J. T. S. Hickman, who was treasurer of the plaintiff, which was also submitted by way of deposition, was substantially to the same effect.

Defendants then introduced the aforesaid Oscar F. Foss, who testified that he had been vice president and general manager of the company. His testimony related to the circumstances which led up to the making of the contract wherein plaintiff agreed to purchase notes from the company.

Foss also testified that negotiations with plaintiff for the purchase of notes from the company were opened early in April, 1912, when he and one Curtis, another officer of the company, called at the office of plaintiff at Hannibal, where they discussed with the aforesaid Whaley ways and means of raising funds for the company; that they disclosed the nature of the company's business and proposed discounting its customers' notes for that purpose; that Whaley took up the matter with the other officers of plaintiff, and subsequently entered into the aforementioned agreement, dated April 9, 1912.

Foss testified further, that at that time the said company had on hand upwards of \$16,000 in customers' notes overdue, the payment of which, in many cases, would have to be enforced, and that the said Curtis informed the said Whaley thereof at the time of these negotiations, and of the further fact that in many instances payment of notes was withheld because of defects in the vending machines for which the notes had been given, but that this difficulty would soon be effectively remedied by a change in the construction of the vending machines, which the officers of the company then had in contemplation.

In addition to the foregoing, the said Foss testified that in the course of these negotiations, Whaley



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For the purpose of having from the company and having only  
in 1911, 1912, when he had the wife, married officer of the  
company, called at the office of plaintiff as detailed, where  
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of the company's business and proposed dissolving the  
partnership, after the first witness; that witness took up the  
subject with the other officers of plaintiff, and subsequently  
entered into the aforementioned agreement, dated April 9,

[illegible]

is added in the foregoing, the only way

became fully aware that because of the defects in these machines some of the notes subsequently to be transferred to plaintiff by the company would not be paid, and that by way of anticipation of such contingencies, plaintiff required the deposit of collateral security by the said company.

All of the foregoing, it appears from the testimony of Foss, transpired before the Lang notes came into the possession of plaintiff, and during the interim upwards of \$6,000 worth of notes in possession of plaintiff accrued but were unpaid, although the witness was not certain whether they were charged back to the company then or later; and that during this time the said Whaley made several inquiries as to the contemplated improvement in the vending machines.

Prior to the institution of the suit on the notes in question plaintiff received the following letter from the said Curtis:

"April 10, 1913.

\* \* \* \* \*

"I was talking with a law firm here yesterday in regard to collecting notes. Some of these notes which you returned to us we have put in the hands of a collecting company and are bringing suit on them through J. H. Leonard as an innocent purchaser. They claim they should have no trouble in collecting these accounts if suit was brought through the original purchaser, which is your bank; but if suit was brought on by Leonard, they would be purchased by him after maturity.

"Why cannot the balance of the notes you have be handled through an attorney there in suit brought by the Hannibal Trust Company, or someone connected with your bank? This is the suggestion the attorney made to me; as you all are purchasers of these notes before maturity. They claim they know all of these notes could be collected if suit had been brought in this way first.

"Please let me know at once if you will do this and I will make arrangements with Chas. Rendlen to handle the notes; or you might do this, if it can be done."

It is contended by defendants that the trial court erred in directing a verdict for the plaintiff, and great





stress is laid upon the evidence in the record which tends to show that certain of the machines made by the company were unsatisfactory and that some of the notes given therefor were not paid at maturity; that plaintiff had knowledge thereof, and of the further fact that the company was at this time endeavoring to improve its output, and that with such knowledge, together with the other facts and circumstances in evidence, it was for the jury to determine whether or not plaintiff was a holder in due course of the Lang notes.

In order to facilitate the circulation of negotiable instruments, it has become the policy of the law to protect a bona fide holder of a note transferred before maturity, though he may have received it under circumstances which would tend to arouse suspicion in an ordinarily prudent person; in fact, it is held that even gross negligence on the part of the recipient of a negotiable instrument at the time of transfer, is not, as a matter of law, fatal to his title, and that nothing short of bad faith on his part will defeat his title thereto. This rule finds expression in Bradwell v. Pryor, 221 Ill. 602. The ultimate fact to be ascertained is the good or bad faith of the holder of the paper, and any competent evidence which may have an illuminative tendency on this issue, should be submitted to the jury. Daniels on Neg. Inst., 6 Ed. vol. 1, sec. 776; Kipp v. Smith, 137 Wis. 234, 118 N. W. 848.

After a most careful reconsideration of the record, we feel constrained to hold that it contains evidence which has some probative force on the ultimate question of the good or bad faith of the holder of the said notes. It therefore became a question to be passed upon by the jury, with the guidance of proper instructions; and in directing a verdict for the plaintiff, the court invaded the province of the jury





which requires a reversal of the judgment.

The further point is made by defendants, that the court erroneously excluded certain evidence offered on their behalf to show a failure of consideration of these notes, and that they were obtained through fraud and misrepresentation.

Apparently the ruling of the court was based upon the supposition that plaintiff had by competent evidence shown itself to be a holder in due course, of the Lang notes. But the countervailing evidence submitted on behalf of the defendants made the question of good or bad faith on the part of plaintiff in purchasing these notes, one of fact. The evidence in question was therefore admissible.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.



ADOLPH J. SABATH and  
HARRY LEVINSON, doing  
business as Sabath &  
Levinson,

Plaintiffs in Error,

vs.

BARBARA VACEK, ANNA VACEK  
and HATTIE VACEK,

Defendants in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 396

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error brought an action on a written contract against defendants in error, to recover the balance alleged to be due thereunder. The jury found the issues for the defendants and the court entered judgment on the verdict.

The only point involved in this case, is whether or not plaintiffs, comprising the firm of Sabath & Levinson, having contracted to render legal services to the defendants, can recover on the contract where they did not personally perform the services therein contemplated.

It is a well-settled principle of law, that where an attorney is employed to prosecute or defend a suit, or to perform other legal services, he cannot, without the special authorization of his client, transfer or delegate his duty to any other attorney. His employment involves a personal trust which cannot be delegated without the special consent of the client. Morgan et al. v. Roberts, 38 Ill. 65; Sloan v. Williams et al., 138 Ill. 43; Tobler v. Nevitt, 132 Am. St. Rep. 160 and note.

Plaintiffs contend, however, that defendants, by accepting the services of other members or employees of



APPROX. 1. 1900  
EARLY 1910s, during  
business in Chicago  
business

WITNESSES TO  
MUNICIPAL COURT  
OF CHICAGO.

Witnesses in Error

vs.

LEAH A. VANCE, et al.  
and FRED A. VANCE,  
Defendants in Error.

2041A.336

THE JURY RECALLED THE DECISION OF THE COURT.

Plaintiffs in error brought an action on a  
written contract against defendants in error, to recover  
the balance alleged to be due thereunder. The jury found  
the issues for the defendants and the court entered judgment  
on the verdict.

The only point involved in this case, is whether  
or not plaintiffs, comprising the firm of Robert A. Johnson,  
having contracted to render legal services to the defendants,  
can recover on the contract when they did not personally  
perform the services therein contemplated.

It is a well-settled principle of law, that where  
an attorney is employed to prosecute or defend a suit, or  
to perform other legal services, he cannot, without the  
special authorization of his client, transfer or delegate  
his duty to any other attorney. His employment involves  
a personal trust which cannot be delegated without the  
special consent of the client. Worland et al. v. Roberts,  
30 Ill. 65; Allen v. Williams et al., 120 Ill. 43; Topler  
v. Kavit, 122 Am. St. Rep. 180 and note.

Plaintiffs contend, however, that defendants, by

their law firm without protest, thereby ratified the act of the plaintiffs in delegating their duty to others. A complete answer to this contention is found in the fact that there is no evidence in the record that defendant Anna Vacek either expressly or impliedly assented thereto or that she had any knowledge that certain of the legal services contemplated by the said contract were being rendered by one Hoffman, an attorney in the employ of the plaintiffs; in the absence of which plaintiffs cannot maintain this action. Defendants' obligation under the said contract being a joint one, a recovery must be had against all or none. (Claflin v. Dunne, 129 Ill. 241.) Accordingly the judgment will be affirmed.

AFFIRMED.

that the firm without protest, thereby ratified the act  
of the plaintiff in delegating their duty to others.  
The plaintiff's contention is based on the fact  
that there is no evidence in the record that defendant  
was asked either expressly or impliedly to accept the  
or that she had any knowledge that certain of the legal  
services contemplated by the said contract were being  
rendered by the Hoffman, an attorney in the employ of  
the plaintiff; in the absence of which plaintiff's cannot  
maintain this action. Defendant's contention under the  
said contract being a joint one, a recovery must be had  
against all or none. (Olafin v. Dunn, 122 Ill. 441.)  
Accordingly the judgment will be affirmed.

AFFIRMED.

OMAR H. WRIGHT and OLIVER  
L. WATSON, trustees, et al.,  
Defendants in Error,

vs.

THOMAS H. MATTERS and  
MARGUERITE L. MATTERS, his wife,  
et al.,  
Plaintiffs in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

204 I.A. 398

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review the record of a foreclosure proceeding on a trust deed, in which a receiver was appointed and a deficiency decree entered against plaintiff in error, Thomas H. Matters.

In the said trust deed, which was attached to and made a part of the bill of complaint, the grantor conveyed as security for the payment of the debt therein described, certain real estate, with the improvements thereon, together with all the rents, issues and profits of said premises; and waived all right to the possession of or income therefrom, pending foreclosure proceedings and until the period of redemption from any sale thereof had expired; and agreed that upon the filing of any bill to foreclose the said trust deed, a receiver should at once be appointed to take possession or charge of the said premises, to collect the income therefrom, and such income, less receivership expenditures, including repairs, insurance premiums, taxes, assessments and receiver's commissions, should be paid to the person entitled to a deed under the certificate of sale, or in reduction of the redemption money if said premises were redeemed.



RECEIVED BY THE DIRECTOR, FBI  
JAN 20 1964

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BEZ. A. 105

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In the said trust deed, which was delivered to and

[illegible]

It appears that the court, in appointing the receiver, acted solely upon the authority contained in the aforementioned provision of the said trust deed. It is insisted by plaintiff in error, Thomas H. Matters, that the said provision was inserted therein solely for the benefit of the person entitled to a deed under the certificate of sale, and that inasmuch as such person is not entitled to the rents, issues and profits of the premises during the period of redemption, the entire provision is void.

It will be noted that the foregoing provision with respect to the appointment of a receiver has a two-fold purpose, viz.: to preserve the security, making all necessary expenditures incident thereto, and to pay the surplus, if any, to the holder of the deed under the certificate of sale.

It is true, the person entitled to the deed under the certificate of sale has no right to the rents, issues and profits collected from the said premises during the redemption period, because he derives his title solely by virtue of the statute and not under the trust deed. (Standish v. Musgrove, 223 Ill. 500; Schaeppi v. Bartholomae, 217 Ill. 105.) But this fact would affect the disposition of only the surplus funds remaining in the receiver's hands after payment of all necessary expenditures, and does not impair the validity of the provision for the appointment of a receiver for the purpose of preserving the security, particularly in view of the fact that the trust deed herein expressly pledged such rents, issues and profits for the payment of the debt.

As to the contention, that the court erred in entering judgment against plaintiff in error Thos. H. Matters on a deficiency decree, we are of the opinion that he is not precluded from raising that question in this court.

It appears that counsel for plaintiff in error

It appears that the court, in regarding the re-  
sult, and not solely upon the evidence contained in the  
affidavit, of the value of the well known fact. It is  
imposed by plaintiff to show, Thomas H. Walker, that  
the well known fact was known to the plaintiff for the  
benefit of the person entitled to a share in the well known  
of sale, and that insurance of such person is not entitled to  
the benefit, insurance and benefit of the person during the action  
of redemption, the entire provision is void.

It will be noted that the foregoing provision with  
respect to the appointment of a receiver has a two-fold pur-  
pose, viz.: to preserve the assets, which are necessary  
organization without success, and to give the receiver, if  
any, to the holder of the debt under the certificate of sale.  
It is true, the court's action in the case under  
the certificate of sale has no effect on the debt, interest and  
profits called for from the sale proceeds under the certificate  
of sale, because the receiver has this right by virtue of the  
statute and not under the trust deed. Ex parte v. Walker,  
222 Ill. 600; Ex parte v. Walker, 222 Ill. 600. And  
this fact would affect the disposition of only the surplus  
funds remaining in the receiver's hands after payment of all  
necessary expenses, and does not impair the validity of  
the provision for the appointment of a receiver for the pur-  
pose of preserving the assets, and is not in view of the  
fact that the court has herein expressly affirmed such result,  
known and given for the payment of the debt.

As for the contention, that the court acted in  
making judgment against plaintiff in order that H. Walker  
on a voluntary basis, as one of the parties that he is an  
equitable lien claimant and entitled to the debt.



Thos. H. Matters approved the decree of sale entered herein, which recited that if the property in question sold for an amount insufficient to satisfy the debt, execution might issue against the said Matters, who was liable for the deficiency; the approval being indicated by the letters "O. K." and the signature of counsel.

It has been held that the abbreviation "O. K." has a well defined meaning and signifies, "all right," "correct;" the effect thereof being determined from the circumstances of the situation.

In the case at bar, no objection was anywhere made to the entry of the said decree. Under the circumstances, therefore, we are of the opinion that counsel, in approving the said decree intended that the notation "O. K." should indicate an unqualified assent, both as to the form and the propriety of its entry. Davis Paint Mfg. Co. v. Metzger Linseed Oil Co., 90 Ill. App. 117; I. D. & W. R. Co. v. Sands, 133 Ind. 433.

Finding no reversible error, the decree will be affirmed.

AFFIRMED.



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VALENTINE WOODS,  
Defendant in Error,

vs.

NORMAN McGRIMMIN,  
Plaintiff in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 399  
MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was a fourth class action in tort to recover damages for the alleged wrongful death of plaintiff's horse. The jury found the defendant (plaintiff in error) guilty and assessed plaintiff's damages in the sum of \$200, upon which judgment was entered by the court.

The original statement of claim, after setting forth that defendant was bailee of the said horse, charged him with the unlawful conversion thereof, and with negligence in causing its death; both of which charges defendant denied in his affidavit of merits.

Subsequently plaintiff, by leave of court, filed an amendment to his statement of claim, in which he charged wilful and malicious conversion of the said horse; to which defendant's affidavit of merits theretofore filed was allowed to stand as a denial.

It is urged that the court erred in permitting plaintiff to file the said amended statement of claim. Underlying this contention is the theory of defendant, that in charging wilful and malicious conversion, it sets up a new cause of action which at the time of the filing of the amended statement of claim was barred by the statute of limitations, having been filed more than two years after

Plaintiff in Error,

vs.

Defendant in Error.

IN SENATE  
JANUARY 10, 1900  
OF CALIFORNIA.

1900 JAN 10

THE JUDICIAL DEPARTMENT OF THE STATE OF CALIFORNIA.

This was a fourth class action in tort to recover damages for the alleged wrongful death of Plaintiff's son. The jury found the defendant (Plaintiff in error) guilty and assessed Plaintiff's damages in the sum of \$2000, upon which judgment was entered by the court.

The original statement of claim, after setting forth that defendant was father of said minor, charged him with the unlawful conversion thereof, and with negligence in causing his death; both of which charges defendant denied in his affidavit of denial.

Subsequently Plaintiff, by leave of court, filed an amendment to his statement of claim, in which he charged willful and malicious conversion of the said minor; to which defendant's affidavit of denial theretofore filed was likewise amended as a denial.

It is urged that the court acted in permitting Plaintiff to file the said amended statement of claim. Underlying this contention is the theory of defendant, that in changing willful and malicious conversion, it sets up a new cause of action which at the time of the filing of the amended statement of claim was barred by the statute of limitations. Having been filed more than two years after

the cause of action accrued.

The statute of limitations is an affirmative defense, and in order to be availed of, it must be specially pleaded. (Heimberger v. Elliott Switch Co., 245 Ill. 448). Defendant having failed to do so, he thereby waived the benefit of this defense.

Other errors are complained of, which are based upon the rules of the municipal court, but inasmuch as this court does not take judicial notice thereof and they have not been preserved in the bill of exceptions, these questions cannot be passed upon.

Objection is raised to the form of the verdict, the ground thereof being that it cannot be determined from the verdict whether defendant was found guilty of a tort as charged in the original statement of claim, or of malice as charged in the amendment thereto. No instruction was requested to eliminate the charge of malice from the case nor was any objection to the form of the verdict made in the court below; the objection comes too late when raised in this court for the first time. 38 Cyc. 1904 and cases there cited.

Finding no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.



the cause of action remains.

The statute of limitations is an affirmative defense, and its effect is to be decided by, it must be specifically pleaded. Helmer v. Helmer, 100 Ill. 2d 121, 122. Defendant having failed to do so, he cannot waive the benefit of this defense.

Other errors are mentioned of, which are based upon the rules of the municipal court, but inasmuch as this court does not have judicial notice thereof and they have not been presented in the bill of exceptions, these questions cannot be passed upon.

Objection is raised to the form of the verdict, the ground thereof being that it would be determined from the stated charges defendant was found guilty of a fact as charged in the original statement of claim, or of failure to charge in the amended statement. The instruction was requested to eliminate the charge of failure from the case and was an objection to the form of the verdict made in the court below; the objection made for later raised in this court for the first time. 55 Ill. 2d 1204 and cases there cited.

Finding no error in the record which justified a reversal, the judgment will be affirmed.

REVEREND.

H. L. CAVENDER and WM. E.  
KAISER, as CAVENDER & KAISER,  
Plaintiffs in Error,

vs.

WILLIAM J. FOX,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 401

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This action was for fraud and deceit alleged to have been practiced by defendant on the plaintiffs. At the close of plaintiffs' case, the jury, by direction of the court, found the defendant not guilty, upon which verdict the judgment herein complained of was entered.

In their statement of claim, plaintiffs allege that the defendant wrongfully represented himself to be the agent of all of the defendants, for the purpose of employing plaintiffs as their associate counsel, in a certain case pending in the Municipal Court of Chicago at the time the representation was alleged to have been made; and that plaintiffs, relying thereupon, rendered legal services on behalf of the said litigants in the said case; and that subsequently to the rendition of said services, plaintiffs learned that defendant was not the agent of said litigants as represented by him to the plaintiffs.

The evidence adduced on behalf of plaintiffs tends to show that the defendant made representations to plaintiffs to the effect that he had seen all the defendants in the said case, all of whom had agreed to have plaintiffs act for them as associate counsel in the aforesaid litigation, and to

W. L. VANDERBILT and W. L. VANDERBILT, JR.,  
Plaintiffs in Error,  
vs.  
WILLIAM F. WOLF,  
Defendant in Error.

OFFICIAL COURT  
OF CHICAGO.

1011-101

THE COURT REPORTER'S OFFICE OF THE COURT.

THIS COURT was for trial and heard, alleged to have been practiced by defendant on the plaintiff. At the close of plaintiff's case, the jury, by direction of the court, found the defendant not guilty, upon which verdict the judgment herein was entered of acquittal.

In their statement of claim, plaintiff allege that the defendant, WILLIAM F. WOLF, represented himself to be the agent of all of the defendants, for the purpose of receiving plaintiff's and their associate counsel, in a certain case pending in the Municipal Court of Chicago at the time the representation was alleged to have been made; and that defendant, WILLIAM F. WOLF, received legal services on behalf of the said plaintiff in the said case; and that defendant of the said plaintiff in the said case; and that defendant to the condition of said plaintiff, plaintiff learned that defendant was not the agent of said plaintiff as represented by him to the plaintiff.

The evidence showed on behalf of plaintiff to show that the defendant made representations to plaintiff to the effect that he had been all the defendant in the said case, all of whom had agreed to have plaintiff act for them as associate counsel in the aforesaid litigation, and to

compensate them for their services; and that, relying upon such representation, plaintiffs performed the said services, after which they learned that defendant had no authority to engage them on behalf of all of said defendants. Evidence was also submitted as to the reasonable value of the said services.

Defendant, who was called to the witness stand under section 33 of the Municipal Court Act, testified that he saw only certain of the said defendants interested in the aforesaid suit, naming them; and denied that he made the foregoing representations to the plaintiffs, with respect to having obtained the unanimous consent of the defendants in said litigation, to engage plaintiffs for them.

Plaintiffs contend that on this state of the record the court erred in directing a verdict for the defendant.

In our opinion, the foregoing evidence offered on behalf of the plaintiffs was sufficient to make out a prima facie case of fraud and deceit, which the defendant was required to rebut, and his failure to do so would entitle plaintiffs to a recovery. Obviously, therefore, the court erred in directing the jury to find defendant not guilty, for which error the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.



consequence known for their services; and that, relying upon  
such representation, plaintiffs purchased the said securities,  
which which they learned that defendant had no authority to  
execute them on behalf of all of said defendants. Plaintiff  
was also subjected to the pecuniary value of the said  
securities.

Defendant, who was called to the witness stand  
under section 53 of the Criminal Code Act, testified that  
he was only certain of the said defendant's intention to the  
defendant's suit, having come; and that that he made the  
defendant's representation to the plaintiff, with respect  
to having obtained the necessary consent of the defendant in  
said suit, to enable plaintiff to sue.

Plaintiff's counsel based on this state of the  
facts the court's finding in finding a verdict for the defendant.  
In our opinion, the foregoing evidence of the  
defendant of the plaintiff's own testimony is not sufficient to make out a prima  
facie case of fraud and deceit, and of the defendant's  
intention to defraud, and his failure to do so would constitute  
plaintiff's loss. Therefore, the court  
found in affirming the jury's finding defendant not guilty,  
for which reason the judgment must be reversed and the cause  
remanded.

REVEREND AND HONORABLE

WILLARD C. HOWE,  
Defendant, in Error,

vs.

CHARLES C. O'NEILL and  
JOHN J. O'NEILL, copartners doing  
business as AMERICAN STORAGE FURNITURE  
AND EXPRESS CO.,  
Plaintiffs in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 402

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment for \$650.00 and costs, rendered in favor of defendant in error (plaintiff below), for damages alleged to have been caused by the negligence of defendants to certain furniture, books, and other household effects which the plaintiff had entrusted to defendants for storage and safe-keeping.

The evidence tends to show that the goods in question were delivered to the defendants in good condition and remained in their possession for upwards of six (6) months; that they were afterwards loaded into a freight car by defendants and shipped to the plaintiff at Cleveland, Ohio; that they arrived at the latter place in a badly damaged condition; that the car into which the goods were placed for shipment, was suitable for that purpose, the roof and sides being in good condition, and the inside of the car being free from dampness both at the time of its departure from Chicago and upon arrival at its destination.

There was also some testimony pro and con, with respect to the fitness of defendants' storage house as such, and the manner in which it was conducted while plaintiff's





aforesaid property was in the possession of defendants.

In our opinion, the question whether or not the damage alleged resulted from any negligence on the part of the defendants, was properly submitted to the jury, who by their verdict found against the defendants. From a careful examination of the evidence we cannot say that such finding was clearly and manifestly against the weight of the evidence.

It is also urged by defendants that it was the duty of plaintiff to examine his property before it was shipped from Chicago, and to notify defendants of any damage thereto, in order to give them an opportunity to make necessary repairs or replacements.

The contract entered into between plaintiff and the defendants, contained the following provision:

"In case of breakage or marring, we will repair same, if possible, and if not, we will replace it with new goods of same value."

It will be noted that this clause is not mandatory, but affords plaintiff a cumulative remedy, to be availed of or not, as he sees fit. (Cook v. Lantz, 116 Ill. App. 472; Kemp v. Freeman, 42 Ill. App. 300.) In our opinion, therefore, defendants' contention is without merit.

Finally it is contended that the damages are excessive.

The maximum amount of damage sustained by plaintiff, as shown by the evidence, is \$360, the reasonable cost of repairing the furniture. And while the record shows that certain other articles, including some 200 books, were more or less damaged, yet there is no evidence as to the actual amount. Such proof was indispensable.

On this state of the record, the judgment for \$650 is clearly excessive. Therefore, if the plaintiff



It is also urged by defendant that it was the duty of plaintiff to examine his property before it was shipped from Chicago, and to notify defendant of any damage thereto, in order to give them an opportunity to make necessary repairs or replacements.

The complaint entered into between plaintiff and the defendant, contained the following provision:

"In case of breakage or damage, we will replace same, if possible, and if not, we will refund its cash or book value."

It will be noted that this clause is not mandatory, but states plaintiff a remedial remedy, to be availed of or not, as he sees fit. (See v. Lantz, 111 Ill. App. 475; 1900 v. Lantz, 111 Ill. App. 850.) In our opinion, therefore, defendant is without merit.

Finally it is contended that the damage was self-inflicted.

The maximum amount of damage recoverable by plaintiff, as shown by the evidence, is \$500, the maximum limit set by the contract. And while the record shows that certain other articles, including some new books, were more or less damaged, yet there is no evidence as to the actual amount. Such proof was inadmissible.

On this point of the record, the judgment for \$500 is clearly correct. Therefore, as the plaintiff

will consent to a remittitur of \$290 within ten days from the filing of this opinion, the judgment will be affirmed for the sum of \$360, otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

will consent to a re-examination of 1900 which has been  
 the basis of this opinion. The judgment will be affirmed  
 for the sum of \$200, otherwise it will be reversed and the  
 cause remanded.

APPROVED BY THE COURT.

ANTONIO MENNELLA, for use  
of Joe Mennella,  
Defendant in Error,

vs.

MICHAEL BOTTAIGLIERO,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 403

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Two trials have been had upon the single issue involved in this case, viz., Was the defendant indebted to the plaintiff?; both resulting in a finding that he was so indebted.

But two questions are presented for our determination on this writ of error; first, Is there any evidence in the record upon which to base an instruction on the question of fraud?; and second, Is the verdict of the jury supported by the evidence?

We find from a careful examination of the record, that there is sufficient evidence therein to fully support both the instruction complained of and the verdict of the jury. The judgment will therefore be affirmed.

AFFIRMED.



ATTORNEY GENERAL, for use  
of the Kentucky  
Department of Justice

PLEASE TO

WILLIAM OWEN

OF OREGON.

2041 A. 108

ALBERT BOWLING  
Witness in case.

EX. 10117 REMAINS DELIVERED THE OFFICE OF THE COURT.

Two trials have now been held upon the single issue  
involved in this case, viz., was the defendant indicted to  
the plaintiff; both resulting in a finding that he was  
not indicted.

But two questions are presented for our deter-

mination on this trial of error; first, is there any  
evidence in the record upon which to base an instruction  
on the question of venue; and second, is the verdict  
of the jury supported by the evidence?

As first from a careful examination of the record,  
that there is sufficient evidence therein to fully support  
both the instruction complained of and the verdict of the  
jury. The judgment will therefore be affirmed.

Approved.

L. N. LABOUY and JACOB  
WERSCHING, partners doing  
business as Labouy & Wersching,  
Defendants in Error,

vs.

AUGUST MARTEN and MARIE MARTEN,  
his wife,  
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 404

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This action was brought by defendants in error who are real estate brokers, to recover commissions alleged to be due from plaintiffs in error, arising out of a certain real estate transaction. The trial resulted in a judgment for the plaintiffs.

The deal in question was not consummated, for the reason that the defendants refused to carry out the alleged contract of sale made on their behalf by the plaintiffs with the prospective purchaser. By the terms of the proposed contract of sale, the purchased price was fixed at \$3150, of which \$1500 was to have been paid immediately, and the balance in deferred payments, evidenced by notes secured by a mortgage on the premises.

A number of questions are presented for review by this writ of error, only one of which, however, we deem it necessary to consider, viz., Did plaintiffs produce a purchaser who was ready, able and willing to buy the property on the terms offered?

Plaintiffs called as their witness the proposed purchaser, who testified that he was ready, able and willing to carry out the contract of purchase, "provided he could

J. H. LADDY and JACOB  
KAMMINS, partners doing  
business as LADDY & KAMMINS,  
Defendants in error,

vs.

AGNES LADDY and MARY LADDY,  
Plaintiffs in error,  
His wife.

WITNESSES TO  
MEDICAL EXAM  
OF DEFENDANT.

2041A-104

THE COURT HAS HERETOFORE GRANTED THE VERDICT OF THE COURT.

These parties were brought by defendant in error who  
are real estate brokers, to recover commissions alleged to be  
due from plaintiff in error, retaining out of a certain real  
estate transaction. The trial resulted in a judgment for the  
plaintiff.

The real in question was not constructed, for the  
reason that the defendant refused to carry out the alleged  
contract of a sale made on their behalf by the plaintiff  
with the prospective purchaser. By the terms of the proposed  
contract of sale, the proposed price was fixed at \$150, of  
which \$100 was to have been paid immediately, and the  
balance in deferred payments, evidenced by notes secured by  
a mortgage on the premises.

A number of questions are presented for review by  
this writ of error, only one of which, however, we deem it  
necessary to consider, viz., did plaintiff produce a per-  
son who was ready, able and willing to pay the proposed  
price for the premises?

Plaintiff called as their witness two proposed  
purchasers, who testified that he was ready, able and willing  
to carry out the contract of purchase, provided he could

get the money (\$1500) from his father-in-law to make the first payment." This evidence falls far short of establishing the fact that he himself was ready and able to perform the contract on his part; nor was there any evidence in any way tending to show that the father-in-law was either able or willing to advance the \$1500 required by the contract.

On this state of the record, it is obvious that the plaintiffs have failed to prove by the evidence that they procured a purchaser who was ready, able and willing to purchase the property on the terms proposed. The judgment must therefore be reversed.

REVERSED.



and the money (\$1000) from his pocket-in-law as money for  
"first payment." This witness tells for most of other  
things and that what he himself was ready and able to pay  
from the contract on his part; and was that was witness  
to and was located at that time the witness-in-law was either  
able or willing to advance the \$1000 required by the con-

On this aspect of the record, it is obvious that the Plaintiff's have failed to prove by the evidence that they procured a partnership with the Defendant. The table to purchase the property on the same proposed. The table must be shown to be correct.

• **STAYING**

MAX COHN et al.,  
Defendants in Error,

vs.

MORRIS COHN,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 405

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendants in error recovered a judgment for \$40 and costs against plaintiff in error, for services rendered the latter in moving his furniture.

Defendant's affidavit of merits charged the plaintiff with negligence in moving and handling his piano, resulting in damage thereto, to the extent of \$40, and alleged that the plaintiffs and he had mutually agreed to release and discharge each other from all claims and demands arising out of the transaction in question.

Plaintiffs offered no evidence whatsoever in support of their claim; while on behalf of the defendant there is the testimony of three witnesses besides that of the defendant himself, whose uncontradicted evidence clearly established the making of the aforesaid settlement agreement, and which also tends to prove that the piano in question was damaged to the extent claimed, as a result of plaintiffs' negligence.

In view of the foregoing undisputed evidence on behalf of the defendant, the court clearly erred in entering judgment for plaintiffs.

The point is made by plaintiffs that there was no consideration to support the alleged settlement agreement. It is a sufficient answer thereto to state that a promise for

SAK GOON of al.  
statements in view.

VS.

SAK GOON  
liability in view.

OF CHARGE.

2041A.405

THE JUDGE HOWEVER REVERSED THE DECISION ON THE GROUNDS.

DEFENDANCE IN VIEW RECOVERED A JUDGMENT FOR \$40  
AND COSTS AGAINST PLAINTIFF IN VIEW, FOR SERVICES RENDERED  
AND FURTHER IN VIEWING HIS FORMER.

DEFENDANCE'S BEHAVIOR AT VIEW CHARGED THE PLAINT-  
IFF WITH NEGLIGENCE IN VIEWING AND HANDLING HIS PLANE, RE-  
SULTING IN DAMAGE THEREOF, TO THE EXTENT OF \$40, AND ALLEGED  
THAT THE PLAINTIFFS AND HE HAD MUTUALLY AGREED TO RELEASE  
AND DISCHARGE EACH OTHER FROM ALL CLAIMS AND DEMANDS ARISING  
OUT OF THE TRANSACTION IN QUESTION.

PLAINTIFFS OFFERED NO EVIDENCE WHATSOEVER IN  
SUPPORT OF THEIR CLAIM; WHILE ON BEHALF OF THE DEFENDANCE  
THERE IS THE TESTIMONY OF THREE WITNESSES TESTIFYING THAT OF THE  
DEFENDANCE HIMSELF, WHOSE UNCONTESTED EVIDENCE CLEARLY  
ESTABLISHED THE FACTS OF THE ACCIDENTS UNFORTUNATE OCCURRENCE,  
AND WHICH ALSO TENDS TO PROVE THAT THE PLAINTIFFS WERE  
CONSENTED TO THE ABOVE CLAIMS, AS A RESULT OF PLAINTIFFS'  
NEGLECTANCE.

IN VIEW OF THE FOREGOING UNCONTESTED EVIDENCE TO BE  
GIVEN BY THE DEFENDANCE, THE COURT GRANTING VIEW IN VIEWING  
JUDGMENT FOR PLAINTIFFS.  
THE POINT IS MADE BY PLAINTIFFS THAT THERE WAS NO  
CONSENTATION TO SUPPORT THE ALLEGED UNFORTUNATE OCCURRENCE.

IT IS A WELL-KNOWN FACT THAT THERE IS A STRONG TENDENCY FOR

a promise, - as was the situation here - constitutes a valuable consideration. Pool v. Docker, 92 Ill. 501.

For the reasons hereinabove assigned, the judgment will be reversed.

REVERSED.



provision, - as was the situation here - constitutes a  
valuable consideration. Wong v. Weller, 22 Ill. 207.

For the reasons hereinabove stated, the

judgment will be reversed.

REVEREND.

23025

IAN  
WASHINGTON/HOME OF CHICAGO,  
a corporation,

Appellee.

vs.

CITY OF CHICAGO,

Appellant.

INTERLOCUTORY ORDER.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

204 I.A. 406

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of injunction issued against appellant, the City of Chicago (defendant below), upon complaint of the Washington Home of Chicago, a corporation.

The bill of complaint, after setting forth that the said Washington Home is a charitable institution created by legislative enactment, having for its object the care, cure and reclamation of inebriates, alleges that for many years last past it has been conducting an institution for such purpose, located at the southeast corner of Ogden avenue and Madison street in the city of Chicago; that said institution owns a certain tract of land at said location, upon which it erected a four-story building in the year 1875; that all its property and effects were acquired by way of gift, grant, devise, bequest or in payment for the care, cure and reclamation of inebriate patients, or from the rent, interest, income or increase on such property and effects, and the investment and re-investment thereof; that \$31,576 was bequeathed to it by virtue and under the provisions of the last will and testament and codicil thereto, of Jonathan



Burr, deceased, who died about February 4, 1869.

The bill then avers that there is now and since July 22, 1912 has been in full force and effect in the city of Chicago, a certain ordinance which provides inter alia for the installation in non-fireproof buildings more than two stories in height, of an inside stand-pipe and automatic sprinkler system, and prescribes a penalty for the non-compliance by anyone amenable thereto; that although complainant's building comes within the provisions of said ordinance, it has not complied therewith on the ground that the said ordinance was, for divers reasons, null and void.

The bill then sets forth that defendant has threatened to harass complainant with various proceedings at law, in an endeavor to compel the installation of the prescribed equipment; that an action of debt for the recovery of the \$200 fine fixed by the said ordinance as a penalty for the noncompliance therewith, was brought and is now pending against complainant in the municipal court of Chicago; and that defendant threatens also to close the said premises unless complainant complies with the said ordinance.

Then follows the recital that a compliance with the said ordinance would entail an expenditure upwards of \$7,000, requiring complainant to use not only part of the income of the said Burr trust fund but also a portion of other funds which complainant has invested and from which it derives an income; that complainant is uncertain as to whether it has the right, power or authority to use any part of the income from the said Burr trust fund for such an expenditure, and seeks the aid, advice, instruction and direction of the court with respect thereto.

The bill also sets forth that for want of modern



But, deceased, who died about February 4, 1939.

The bill then goes on to say that there is now and since

July 22, 1911 has been in full force and effect in the city

of Chicago, a certain ordinance which provides for the

for the installation in non-fireproof buildings more than

two stories in height, of an inside stand-pipe and automatic

extinguisher system, and prescribes a penalty for the non-

compliance by anyone owning a building; that although com-

pliance with the provisions of said

ordinance, it has not complied therewith on the ground that

the said ordinance was, for diverse reasons, null and void.

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equipment; that an action of debt for the recovery of the

\$200 fine fixed by the said ordinance as a penalty for the

noncompliance therewith, was brought and is now pending

against complainant in the municipal court of Chicago; and

that defendant threatens also to close the said premises

unless complainant complies with the said ordinance.

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the said ordinance was made until an expenditure upwards of

\$1,000, regarding complainant to see not only part of the

income of the said But first that also a portion of

other funds which complainant has received and from which

it derives an income; that complainant is uncertain as to

whether it has the right, power or authority to use any part

of the income from the said But first that for such an

expenditure, and make the aid, advice, instruction and

direction of the court with respect thereto.

The bill also sets forth that for want of which

conveniences, the said building, though in good repair, is rapidly becoming unsuited for the purpose to which it is being put, and that within the next five or six years complainant will be compelled to tear down the said building and replace it with a modern structure; that the directors of the said institution already have this matter in contemplation.

Complainant also avers that if defendant carries out its threat to prevent complainant from further using the said building because of its noncompliance with the said ordinance and prosecutes the suit now pending or commences others, complainant will suffer irreparable injury, because the damages incident thereto will be unascertainable, and because of the further fact that defendant, in executing the said ordinance will act through insolvent agents, officials or employees.

No answer having been filed by defendant, apparently the court in entering the said order, acted solely upon the recitals contained in the verified bill of complaint.

By the said order, defendant was restrained and enjoined from the further prosecution of the suit then pending, and from taking any other action against complainant because of its noncompliance with the said ordinance; and from interfering with its possession, occupancy, enjoyment and use of its said building, until the further order of court.

It is conceded that the validity of the said ordinance may be properly determined in the pending action at law. Complainant maintains, however, that its right to equitable relief rests upon other grounds, viz.: that it is seeking a construction of the Burr will and codicil, with respect to the use of the said trust fund, in order to

of the said institution already have been visited in connection with the said institution, and the said institution is now in the process of being reorganized, and the said institution is now in the process of being reorganized, and the said institution is now in the process of being reorganized.

the said ordinance will not be enforced, the said ordinance will not be enforced, the said ordinance will not be enforced.

the answer having been filed by defendant, plaintiff  
admits the court is warranted in making order accordingly.  
where the records contained in the verified bill of complaint.  
By the bill order, defendant was prohibited and  
enjoined from the further prosecution of the bill from  
pending, and from taking any other action prejudicial  
because of the noncompliance with the said subpoena; and  
from interfering with its possession, enjoyment, enjoyment  
and use of its said building, until the further order of  
the court.

It is conceded that the validity of the said ordinance may be properly determined in the judicial system of law. Government and citizen, however, have the right to participate in the determination of the ordinance, and it is feeling a conviction of the duty and desire.



determine whether or not it permits of the foregoing expenditure; and further, that it will suffer irreparable injury if the said ordinance is enforced against it.

It will be noted that complainant is the owner of the building and premises hereinabove set forth which, in the absence of any allegation to the contrary, we must assume is unincumbered; and that complainant has funds in addition to the said Burr fund, although their amounts and nature are not set forth in the bill, save to recite that complainant derives an income therefrom. No reason is assigned why such other funds are not available for the aforesaid disbursement, nor does it appear that complainant is prohibited from incumbering the said premises for the purpose of raising funds. The allegation that complainant contemplates the erection of a new building within a few years would also tend to show that complainant must have available means of raising money, and no reason is indicated why such means cannot now be resorted to for the purpose of installing the prescribed equipment.

The foregoing recitals in the bill of complaint do not comport with complainant's contention here that, save for the said Burr fund, it is without available means with which to install the prescribed equipment, and is reconcilable only with the theory that complainant is seeking to evade a compliance with the said ordinance.

The bill of complaint contains only a general allegation of irreparable injury. This, our Supreme Court has held, is insufficient; the bill should recite facts and circumstances from which it clearly appears that irreparable injury will follow if the said fire ordinance is enforced. (Poyer v. Village of Des Plaines, 123 Ill. Ill; C. B. & Q. R. R. Co. v. City of Ottawa, 148 Ill. 397.) The averment





that defendant has threatened and continues to threaten to close complainant's institution if the said ordinance is not complied with, does not ipso facto imply irretrievable damage. Whether the said ordinance be valid or void, it is obvious that the municipality in passing it, had for its object the safety of the public in the event of conflagration.

In our opinion, the verified bill of complaint fails to allege such a state of facts as would warrant the intervention of a court of chancery, by way of injunction.

In this view of the case, it becomes unnecessary to construe the said Burr will and codicil for the purpose of determining the latitude allowed the trustees in making expenditures thereunder.

For the reasons hereinabove assigned, the decree will be reversed.

REVERSED.



ESTELLE BLOOMER,  
Plaintiff in Error,

vs.

LOUIS H. VERRICK and ANTON J.  
GERMAK, Bailiff, etc.,  
Defendants in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 408

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action for "Trial of right of property" under the statute. Plaintiff claimed to be the owner of certain personal property which had been levied upon by defendant, Anton J. GermaK, as bailiff of the Municipal Court of Chicago, by virtue of a certain writ of execution issued by said court in another certain cause there pending wherein defendant Louis H. Verrick was plaintiff, and Mathew Bleomer was defendant. There was a finding and judgment in favor of defendants. This writ of error is brought to review the correctness of such judgment. The sole question involved is that of the right to the property in question.

The evidence offered by defendants tended to show that the property levied on was the co-partnership property of the claimant and her husband, the judgment debtor. We think the evidence tended to establish that theory, and hence justified the court's finding against the claimant. Such finding however does not determine that the property belongs to the defendant in the execution. (Cassell v. Williams, 12 Ill. 386.) While claimant's counsel argues that co-partnership property cannot be taken to satisfy a judgment against one of the partners, and that seems to be the law in this state (Gerard v. Bates, 124 Ill. 150) yet the only question



WILLIAM H. HARRIS, Plaintiff in Error,  
vs.  
LOUIS H. HARRIS and others, Defendants in Error.

804 I.A. 408

THE COURT OF APPEALS IN THE CITY OF CHICAGO.

This was an action for "trial of right of property" under the statute. Plaintiff claimed to be the owner of certain personal property which had been levied upon by defendant, when it became, as plaintiff of the Municipal Court of Chicago, by virtue of a certain writ of execution issued by said court in another certain cause then pending wherein defendant Louis H. Harris was plaintiff, and Matthew H. Harris was defendant. There was a finding and judgment in favor of defendant. This writ of error is brought to review the correctness of such judgment. The sole question involved is that as the right to the property in question.

The evidence offered by defendant tended to show that the property levied on was the co-ownership property of the plaintiff and her husband, the judgment debtor. In this the evidence tended to sustain the theory, and hence justified the writ's finding against the claimant. Such finding however does not determine that the property belongs to the defendant in the execution. (Cassell v. Williams, 111. 100.) While defendant's counsel argued that co-ownership property cannot be taken to satisfy a judgment against one of the partners, and that seems to be the law in this state (Hurd v. Hurd, 111. 100) yet the only question

for decision here is whether the evidence sustained the right of property in claimant alone. As it did not, the judgment against her must be affirmed.

AFFIRMED.

for isolated facts is whether the evidence sustains the  
 view of poverty in this case. In 1885, the  
 judgment should not be affirmed.

APPROVED.

455 - 21853

JOHN M. GLENN,  
Appellant,

vs.

ANDREW M. LAWRENCE and  
ROY D. KEEHN,  
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

204 I.A. 411

**STATEMENT OF FACTS.** This was an action on the case for malicious prosecution brought by John M. Glenn against Andrew M. Lawrence and Roy D. Keehn. At the close of the plaintiff's evidence the court directed a verdict, and entered judgment thereon, in favor of defendants and against plaintiff for costs of suit. This appeal is brought to review the correctness of said judgment.

On Feb. 14, 1913 the Illinois State Senate passed a certain resolution providing that a committee, to consist of the President and four members of that body, be appointed for the purpose of investigating the subject of white slave traffic in Illinois. Barratt O'Hara, who was then Lieutenant Governor of Illinois, and ex-officio president of the State Senate, became, in accordance with the provisions of said resolution, chairman of said committee.

On March 6, 1913, (during the progress of said investigation) there appeared in the Manufacturer's News, a certain weekly newspaper published in Chicago, and owned by plaintiff, an article concerning Andrew M. Lawrence and Barratt O'Hara, and which, in part, is as follows:

"Lieutenant-Governor Barratt O'Hara, chairman of the so-called 'white slave commission' was for a number of years, connected with the Chicago Examiner. He now enjoys the fullest confidence of Andrew Lawrence, representative of the Hearst papers in Chicago. It is our judgment that this investigation would not be nearly



JOHN M. GILSON

Applicant

vs.

ANDREW M. LAWRENCE and

JOHN D. KENNEDY

JOHN M. GILSON

Applicant

vs.

ANDREW M. LAWRENCE and

STATEMENT BY FACTS. This was an action to  
 have for malicious prosecution brought by John M. Gilson  
 against Andrew M. Lawrence and John D. Kennedy. At the close  
 of the plaintiff's evidence the court directed a verdict  
 and entered judgment thereon, in favor of defendant and  
 against plaintiff for costs of suit. This appeal is brought  
 to review the correctness of said judgment.

On Feb. 14, 1913 the Illinois State Senate passed  
 a certain resolution providing that a committee, to consist  
 of the President and four members at that body, be appointed  
 for the purpose of investigating the subject of white slave  
 traffic in Illinois. Harvey O'Leary, who was then Lieutenant  
 Governor of Illinois, and ex-officio President of the State  
 Senate, passed, in accordance with the provisions of said  
 resolution, chairman of said committee.

On March 2, 1913, during the progress of said  
 investigation (there reported in the Commonwealth's News, a  
 certain weekly newspaper published in Chicago, and owned by  
 plaintiff, an article concerning Andrew M. Lawrence and  
 Harvey O'Leary, and which, in part, is as follows:

"Lieutenant-Governor Harvey O'Leary, chairman of  
 the so-called 'white slave committee', was for a number  
 of years, connected with the Chicago Tribune. He now  
 enjoys the highest confidence of Andrew Lawrence, ex-  
 president of the Senate passed in Chicago. It is  
 not probable that the investigation would not be carried  
 out in a manner that would reflect credit on the State  
 Senate."

so vigorous if the State street merchants would furnish the Hearst papers with a sufficient amount of full-page advertising to satisfy the greed of Mr. Lawrence.

Under the pretext that a woman must become a prostitute unless she receives \$12 a week in wages at whatever employment she is following, the Illinois State Senate has started out to create sufficient public sentiment to pass a minimum wage law. The movement is backed by a number of reform organizations and apparently has the endorsement of the state administration."

On March 13, 1913, there appeared in the same publication another article which, inter alia, contained the following:

"When the owner of Manufacturers' News was suddenly brought before the senate vice-commission in Chicago last Saturday and questioned as to the foundations for his statement as to the connection between Lieutenant-Governor O'Hara and Andrew Lawrence, the representative of the Hearst papers in Chicago, thirty or forty newspaper men and 200 or so spectators were present. \* \* \*

During the examination, Lieutenant-Governor O'Hara was repeatedly prompted by M. B. Coan, who was immediately behind him and part of the time stood up so he could better say to Mr. O'Hara what he desired. Every person in the room had as good an opportunity to observe what was taking place between Mr. O'Hara and Mr. Coan as the witness. Many of the members of the General Assembly and many of the newspaper men present know Mr. Coan personally and know whether he has relations with Andrew Lawrence and the Hearst papers or not.

We should like to inquire if there is a member of the commission or a newspaper man who is familiar with conditions around Chicago and over the state who will for one moment contend that Mr. Coan is not the personal representative of Andrew Lawrence? Does not every newspaper in Chicago know Mr. Coan reports to Mr. Lawrence? Is it necessary for Mr. O'Hara and Mr. Lawrence to see each other every day? There are other means of communication.

We should like to ask Lieutenant-Governor Barratt O'Hara whether any of the employes of the commission have been or are now the employes of Mr. Lawrence or the Hearst papers? We will ask Mr. Barrett O'Hara if certain patronage was not distributed by the commission in order that Mr. Andrew Lawrence might have consideration, and to give him an opportunity to keep in close touch with the inner workings of the commission? We should like to ask Mr. Barratt O'Hara if these influences do not dictate the witnesses who appear before the commission?"

On the day succeeding the second publication, Andrew M.

Lawrence appeared before Hon. Thomas F. Scully, then sitting as one of the Judges of the Municipal Court of Chicago, and there subscribed and swore to a criminal complaint against John M. Glenn and Glenn & Co., a corporation, which complaint





set forth the publication of March 6, 1913, and alleged that said publication was a malicious and defamatory libel against Andrew M. Lawrence and Barratt O'Hara. Judge Scully thereupon endorsed on said complaint the following:

"I have examined the within information and the informant, and am satisfied that there is probable cause for filing the same. Leave is hereby granted to file it and it is ordered that an instantar capias issue against the defendant. Bail fixed at \$2,000.

Thomas F. Scully,  
Judge of the Municipal Court of Chicago."

Pursuant to such direction a capias was forthwith issued and served on plaintiff, who, by virtue thereof, was taken to police headquarters and then to the Municipal Court, where he was admitted to bail. On April 2, 1913 the Municipal Court, upon motion of plaintiff's counsel for a rule on the People etc. to file an information in lieu of a complaint, indicated that it would allow such motion. E. J. Raber, assistant State's attorney for Cook County, appeared in behalf of the prosecution and the evidence tends to show that Roy D. Keehn, who was present, appeared as attorney for Andrew M. Lawrence. Thereupon the following took place:

"Mr. Keehn: As I understand, the court's holding, then is that you have jurisdiction of this to try?

The Court: I shall treat the pleading on file as an information, with the suggestion of the state's attorney that he may amend as it might be defective on its face.

Mr. Raber: Well, the state's attorney does not \* \* care to amend it. If the theory upon which this prosecution is brought is right, of course, we don't want to proceed as an information, because it is not an information.

The Court: No, it is not now, but you can make it a good information. The court will treat it as an information.

Mr. Raber: Then I will make a motion to dismiss it.

Mr. Keehn: Whatever the proper motion is to get out of the court, without the court having jurisdiction to withdraw the -

Mr. Wayman: You cannot get out of this court.

Mr. Raber: I can make a motion to dismiss it.

The Court: Do you make that an state's attorney?

Mr. Raber: Yes.

The Court: All right, The case is dismissed on motion of the state's attorney."



set forth the position of the 1st, 2nd, and 3rd  
that said position was a violation and defendant liable  
against the 1st, 2nd, and 3rd. The 1st, 2nd, and 3rd  
therefore exposed as said complaint the following:

"I have examined the above information and the  
information, and am satisfied that there is probable cause  
for filing the same. I have in hereby granted to file it  
and it is ordered that an indictment be returned against  
the defendant. Held filed at \$2,000.  
Thomas J. Sullivan,  
Judge of the Municipal Court of Chicago."

Pursuant to such direction a copy was forthwith issued and  
served on defendant, who, by virtue thereof, was taken to  
jail for non-payment and then to the Municipal Court, where  
he was committed to jail. On April 2, 1913 the Municipal  
Court, upon motion of plaintiff's counsel for a writ on the  
part of the defendant, is now in a position  
informed that it will allow such writ. It is now  
assumed that the attorney for the defendant, appeared in de-  
fense of the defendant and the witness to show that  
defendant was present, appeared as attorney for  
defendant. The following facts are:

Mr. Justice: As I understand, the court's holding  
was that you have jurisdiction of this case?  
The Court: I shall treat the question on the  
basis of information, with the exception of the state's  
evidence that he was present as it might be defective in  
its facts.  
Mr. Justice: Well, the state's evidence does not  
show to me that it is. If the theory upon which this government  
is brought in is right, or correct, we don't want to proceed  
on an information, because it is not an information.  
The Court: No, it is not now, but you may make it  
a good information. The court will treat it as an infor-  
mation.  
Mr. Justice: Then I will make a motion to dismiss it.  
Mr. Justice: However, the proper action is to set  
aside the court's finding.  
Mr. Justice: You cannot get out of this court.  
Mr. Justice: I am making a motion to dismiss it.  
The Court: Do you make that as state's attorney?  
Mr. Justice: Yes.  
The Court: All right. The case is dismissed on  
motion of the state's attorney."

The said order of dismissal was entered by the court, and plaintiff discharged. Plaintiff's evidence further tends to show that later, during the same day, assistant state's attorney Haber (accompanied by defendant Lawrence), appeared before the Criminal Court of Cook County, and presented another criminal complaint, prepared by him, based upon said publication or publications. Said complaint was subscribed and sworn to by Lawrence, and a capias directed to issue thereon against plaintiff, who, in response thereto, upon the following day, appeared in said court, waived service and was admitted to bail. The assistant state's attorney testified that he presented two complaints to the Criminal Court, the second based upon the publication of March 13, 1913, and that two warrants issued thereon, but the then presiding judge of said court testified that he did not think two complaints were presented. On May 1, 1913 Andrew M. Lawrence and Barratt O'Hara appeared and testified before the Grand Jury of Cook County in regard to the alleged libel, which body returned a "not a true bill", and subsequently, on May 16, 1913, upon motion of plaintiff's counsel, and with the consent of the assistant state's attorney, all proceedings pending in the Criminal Court against plaintiff were <sup>dis</sup>missed, and four days later the present action was commenced. The declaration consists of three counts. The first count charged defendants with conspiracy to maliciously prosecute and arrest plaintiff upon two charges based upon said publication, alleged not to be libelous. The second count charged malicious prosecution based on a charge of libel on the publication of March 6, 1913, and the third count charged malicious prosecution based on the publication of March 13, 1913. The ad damnum was laid at \$50,000.

The said order of dismissal was entered by the court, and  
dismissal was entered. Plaintiff's evidence further tends to  
show that later, during the same day, defendant's attorney  
appeared (represented by defendant's attorney), and presented  
before the Criminal Court of Cook County, and presented  
another Criminal Complaint, charging by him, based upon said  
evidence as indicated. This complaint was supported  
and went to the grand jury, and a return directed to return  
thereon a bill of indictment, and, in response thereto, upon the  
following day, returned in said court, which return and  
was returned as bill. The complaint stated that defendant committed  
that he committed the complaint to the Criminal Court, and  
exhibit based upon the affidavit of March 15, 1915, and  
that two witnesses named therein, but the same providing  
evidence of said court testified that he did not return two more  
evidence were returned. On May 1, 1915, return to the grand  
jury before the court was returned and testified before the grand  
jury of this court in return to the grand jury, which  
body returned a "not a true bill", and subsequently, on the  
10, 1915, upon return of plaintiff's return, and with the  
consent of the defendant's attorney, his proceedings  
ended in the Criminal Court against plaintiff were  
dismissed. The first return was returned. The  
defendant's complaint of this court. The first return  
against a defendant who was charged as unlawfully practicing  
and these plaintiff's return two charges based upon said sub-  
stantial, alleged not to be true. The second return  
against plaintiff's proceedings based on a return of bill on  
the return of May 6, 1915, and the return based upon  
evidence presented based on the affidavit of March 15,  
1915. The return was returned as bill.



MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

There is no evidence in this case tending to support the allegations in plaintiff's declaration as to defendant Roy D. Kechu. We shall therefore proceed to consider the questions presented in relation to Andrew M. Lawrence, the other defendant.

To maintain an action for malicious prosecution the plaintiff must show that the defendant acted from malicious motives in prosecuting him and that said defendant had no sufficient reason to believe him guilty. If either of these elements be wanting, the action must fail. The want of probable cause is the main ground of this action, and though negative in its character, must be proved by the plaintiff by some affirmative evidence. Brown v. Smith, 83 Ill. 291. While the law casts the burden of proof upon the plaintiff to prove a negative - to show clearly that defendant did not have probable cause to institute the criminal prosecution, - slight evidence will usually suffice for such purpose. Israel v. Brooks, 23 Ill. 575. In the instant case the court, at the close of plaintiff's evidence directed a verdict in favor of defendants. Was there any evidence tending to show that Andrew M. Lawrence did not have probable cause in instituting the criminal proceedings complained of? Probable cause which will relieve a prosecution from liability has been defined to be a belief by him in the guilt of the accused, based on circumstances sufficiently strong to evidence such belief in the mind of a reasonable and cautious man. Wilkerson v. McShee, 153 Mo. App. 343. The evidence tends to show that the state's attorney caused his assistant to examine the publication in question; that the latter reported the result of such examination to his superior; that



THE JURY'S VERDICT, THE COURT OF THE JURY.

There is no evidence in this case showing that the defendant is innocent of the crime charged. The evidence is such that the jury should find the defendant guilty. The evidence is such that the jury should find the defendant guilty. The evidence is such that the jury should find the defendant guilty.

To sustain the charge the prosecution must show that the defendant is guilty. The evidence is such that the jury should find the defendant guilty. The evidence is such that the jury should find the defendant guilty. The evidence is such that the jury should find the defendant guilty.

The evidence is such that the jury should find the defendant guilty. The evidence is such that the jury should find the defendant guilty. The evidence is such that the jury should find the defendant guilty. The evidence is such that the jury should find the defendant guilty. The evidence is such that the jury should find the defendant guilty.

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thereafter a complaint, based on such publication or publications, sworn to by Andrew M. Lawrence, was filed in the Municipal Court, containing the following endorsement of the Judge to whom it was presented, "I have examined the within information, and am satisfied that there is probable cause for filing the same." It further appears that following the dismissal of said proceedings and during the same day, the assistant state's attorney prepared another complaint charging plaintiff with criminal libel, based on the same charges, and presented same to a judge of the Criminal Court, and subsequently presented the entire subject matter to the Grand Jury of Cook County for investigation. Such evidence does not tend in our opinion to show that Lawrence acted without probable cause. On the contrary we think it tends to show that defendant Lawrence in proceeding at each step practically under the direction, if not the advice, of the state's prosecuting officer, and after a judge had endorsed on his original complaint before ordering a capias that he was satisfied that there was probable cause, was governed by the views of the officers of the law entrusted with the administration of the criminal law as to the libelous character of said articles, as fully as if he had been advised by private counsel, and had reason to believe from their course and attitude after the matter was so submitted for their judgment, that the articles complained of were criminally libelous. Hence the evidence tended to show that he acted upon probable cause. The majority of this court express no opinion as to the alleged libelous character of said publication or publications. The question to be tried in this action was not whether the accused (plaintiff) was guilty of criminal libel, but whether the prosecutor (Lawrence) had reasonable grounds to believe and did actually believe that plaintiff was guilty. Anderson





v. Friend, 71 Ill. 475; Shea v. Morand, 191 Ill. App. 11.

McIlroy v. The Catholic Press Co., 254 Ill. 290, was an action for malicious prosecution. The trial court, at the close of plaintiff's evidence, directed a verdict in favor of defendant. The Supreme Court in affirming the action of the lower court said:

"There have been a great many cases where it has been held, in substance, that a conviction by a tribunal constituted by law, although subsequently reversed, raises a presumption of probable cause and is sufficient proof that the prosecution was not groundless unless the presumption is overcome by proof that the conviction was procured by corruption, false testimony or other undue or unlawful means. (Citing many cases.) It is true, that when the judgment against the plaintiff was reversed and the cause remanded for a new trial, the judgment was set aside and the case stood just as though it never had been tried. The reversal settled the question that the accused was not properly convicted, that the facts proved, did not, in law constitute the crime of embezzlement, and that the plaintiff was, in fact, innocent of the crime laid to her charge, but the improper conviction arose from the mistaken view of the law by the trial court and it did not establish that there was no probable cause for believing her guilty. The error of the trial court is not chargeable to the defendant and the conviction continued to be evidence of probable cause for the prosecution. \* \* \* It did not tend to prove a want of probable cause that Hubbard (agent of defendant) did not know the law better than the judge of the criminal court." (The italics are ours.)

It is also urged that defendants instigated and procured the dismissal of the proceedings in the Municipal Court; thereby tending to show bad faith and want of probable cause. While in other jurisdictions it has been held that the voluntary dismissal of a criminal prosecution is evidence of want of probable cause for instituting it, this court held otherwise in Gentzen v. H. M. Hecker Co., 173 Ill. App. 127. In that case there was no question raised, as here, as to the effect of a dismissal at the instance of the prosecuting witness but we do not think it distinguishable in principle from the instant case. We are of opinion that the evidence tending to show that the defendant, Kechn, acted in conjunction with the state's attorney in regard to such dismissal did not tend





to prove want of probable cause as to either defendant, in view of the fact that a similar complaint was subsequently presented and filed in the criminal court on the same day.

It is further contended by plaintiff's counsel that the act of the Grand Jury in returning "Not a true bill" is prima facie evidence of want of probable cause. Cases cited by counsel in support of such contention also hold that a discharge of the accused by an examining magistrate, is prima facie evidence of want of probable cause. The obvious reason for such holding is that the duty of an examining magistrate is similar to that of a grand jury, viz., to determine the question whether there is probable cause for the prosecution. In Illinois the discharge of the accused by an examining magistrate is not prima facie evidence of want of probable cause. Israel v. Brooks, supra; Farnslee Co. v. Griffin, 136 Ill. App. 307. We are of the opinion that the doctrine announced in Israel v. Brooks, as to a discharge by an examining magistrate is analagous to the action of a grand jury in ignoring a bill of indictment. That the return of a "no bill" by a grand jury is not evidence of want of probable cause has been frequently held. Fulmer v. Harmon, 3 Strob. Law. Rep. (S. C.) 576; Appar v. Eoolston, 43 N. J. Law Rep. 57. The writer of the opinion in the latter case, after reviewing the American and English authorities on this question said:

"I am aware that there are cases in the courts of this country, entitled to the greatest respect, in which it has been held that the failure of the grand jury to indict is prima facie evidence of the want of probable cause. But there are also decisions of the courts of our sister states, entitled to equal respect, holding the contrary; and I think the doctrine laid down by Starkie, Phillips and Greenleaf is founded on sound principles of law, and is consistent with public policy."

For the reasons herein stated, we are of opinion that there is no evidence tending to show want of probable

It is a very common mistake to think that the only way to get a good result is to use a lot of force. In fact, the best results are often obtained by using a small amount of force applied in a steady, consistent manner. This is why it is important to practice regularly and to focus on technique rather than on power.

1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 17

is also a clear evidence of want of knowledge of the law. The evidence is that the defendant is not a person of ordinary intelligence and is not a person of ordinary knowledge of the law. The evidence is that the defendant is not a person of ordinary intelligence and is not a person of ordinary knowledge of the law.

[illegible]

that the localities mentioned in Lynch v. Brown, 301 U.S. 246, 58 S.Ct. 615, 80 L.Ed. 281, are not the same as the localities mentioned in Lynch v. Brown, 301 U.S. 246, 58 S.Ct. 615, 80 L.Ed. 281, and that the localities mentioned in Lynch v. Brown, 301 U.S. 246, 58 S.Ct. 615, 80 L.Ed. 281, are not the same as the localities mentioned in Lynch v. Brown, 301 U.S. 246, 58 S.Ct. 615, 80 L.Ed. 281.

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1. The above information was obtained from the records of the FBI in New York City, New York, on 10/10/68.

It is a common belief that the future of the world is in the hands of the few. This is a dangerous illusion. The future is in the hands of the many. It is the duty of the few to lead the many, but it is the right of the many to choose their leaders. The future is not predestined. It is the result of the choices we make today. We must therefore act wisely and justly, for our actions today will determine the world of tomorrow.

that there is no evidence available to show that it is probable  
for the present design studies, the use of signal

-6-

cause, and that the court did not err in directing a verdict in favor of defendants. The judgment of the Superior Court will therefore be affirmed.

AFFIRMED.

MR. JUSTICE McDONALD CONCURRING SPECIALLY:

I concur in the conclusions reached and the reasoning set forth in the foregoing opinion, but am of the further opinion that the article in question is libelous per se.



cannot, and that the court did not in its opinion a variety  
in favor of defendant. The judgment in the superior court  
will therefore be affirmed.

1911.

MR. JUSTICE ROBERTSON CONCURRING SEPARATELY:

I concur in the conclusions reached and the  
reasoning set forth in the foregoing opinion, but am of  
the former opinion that the article in question is  
libelous per se.

MARY HOFFMAN, a minor by  
Apollonia Hoffman, her next  
friend,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,  
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

204 I.A. 414

,MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment against defendant for \$1500 as damages for injuries received by her while walking across a public highway by being struck by a street car owned and operated by defendant. Defendant contends that, (1) the verdict is against the manifest weight of the evidence, (2) the court erred in its instructions to the jury, and (3) the damages are excessive. At the time of the said occurrence, plaintiff was about eight years old.

The jury was in a better position than this court to determine from the age, intelligence and experience of the plaintiff, together with the other facts and circumstances in evidence, whether she was in the exercise of ordinary care, and whether defendant's servants in the operation of the car were negligent at and before the time in question. We are unable to say that the verdict is against the manifest weight of the evidence.

Defendant contends that the court erred in giving the following instruction:

"If from the evidence of the case and under the instructions of the court the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration then, to enable the jury to estimate the amount of such damages it is

JOHN J. HARRIS, a minor by  
Special Verdict, for cause  
tried,

defendant,

vs.

CHICAGO RAILROAD COMPANY,  
a corporation,

plaintiff.

JOHN J. HARRIS

JOHN J. HARRIS

JOHN J. HARRIS

JOHN J. HARRIS

JOHN J. HARRIS

In this case plaintiff recovered a judgment against defendant for \$1000 as damages for injuries received by her while walking across a public highway by means of a street car owned and operated by defendant. Defendant contends that (1) the verdict is against the weight of the evidence, (2) the court acted in its judgment to the injury, and (3) the damages are excessive. At the time of the trial, plaintiff was about eight years old.

The jury was in a better position than this court

to determine from the age, intelligence and experience of the plaintiff, together with the other facts and circumstances in evidence, whether she was in the exercise of ordinary care, and whether defendant's servants in the operation of the car were negligent at and before the time in question. It is the opinion of the court that the verdict is against the weight of the evidence.

JOHN J. HARRIS

JOHN J. HARRIS

JOHN J. HARRIS



not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the business affairs of life."

Said instruction is objected to because it refers to plaintiff's declaration wherein it is alleged that the injuries complained of will for the rest of her life, disable plaintiff from attending to her affairs and business.

A similar instruction in a case brought by an adult was approved in North Chicago Street R. R. Co. v. Fitzgibbons, 180 Ill. 466, wherein the declaration contained an allegation (not set forth in said opinion) that plaintiff, because of the injuries complained of, was "hindered and prevented from transacting her business affairs."

In the instant case there was no attempt to establish a basis for damages except for suffering. It was admitted by plaintiff's attending physician that there was no permanent injury. It seems improbable in this state of the record that the jury were led to consider anything other than pain and suffering endured by plaintiff, and the amount of the verdict does not indicate that they did. We cannot assume that the jury acted upon the theory that there was a permanent injury, and no such inference can be legitimately drawn from the evidence. We do not think, therefore, that the giving of such instruction was reversible error.

The injury complained of was a fracture of the neck of the right humerus. The evidence tended to show a union of the fragments of bone at point of fracture, and at the time of the trial, (nearly three years following the date of the injury) some limitation of motion. We do not think the verdict excessive. The judgment of the Superior Court should be affirmed.



and accordingly that any witness should have understood  
 and spoken as to the amount of such damages, but the  
 jury may themselves make such estimate from the facts  
 and circumstances in proof, and by considering them in  
 connection with their knowledge, observation and  
 experience in the business affairs of life.

Said defendant is entitled to recover its costs

as plaintiff's declaration shows it is alleged that the  
 injuries sustained of all for the rest of her life, disable

plaintiff from any activity in her relation and business.

A similar declaration in a case brought by an adult

was approved in Smith v. Smith, 100 Ill. 443, 200 Ill. 443, wherein the declaration contained an allegation  
 (not set forth in said opinion) that plaintiff, because of the

injuries sustained by her, was "disabled and prevented from

transacting her business affairs."

In the instant case there was no attempt to establish

a basis for recovery except for suffering. It was admitted by

plaintiff's attorney that there was no permanent  
 injury. It seems impossible in this state of the record that

the jury were led to consider anything other than pain and

suffering caused by plaintiff, and the amount of the verdict

does not indicate that this did. It cannot be shown that the

jury were upon the theory that there was a permanent injury,

and as such injuries can be satisfactorily shown from the

evidence. As he has said, therefore, that the giving of

such instructions was reversible error.

The injury complained of was a fracture of the

neck of the right humerus. The evidence tended to show

a union of the fragments of bone at point of fracture, and

of the time of the trial, (about three years following  
 the date of the injury) some limitation of motion. As to  
 the extent of the injury, the evidence was conflicting. The  
 evidence does not show an attempt.

MARY HOFFMAN, a minor by  
Apolonia Hoffman, her next  
friend,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,  
a corporation,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment against defendant for \$1500 as damages for injuries received by her while walking across a public highway by being struck by a street car owned and operated by defendant. Defendant contends that, (1) the verdict is against the manifest weight of the evidence, (2) the court erred in its instructions to the jury, and (3) the damages are excessive. At the time of the said occurrence, plaintiff was about eight years old.

The jury was in a better position than this court to determine from the age, intelligence and experience of the plaintiff, together with the other facts and circumstances in evidence, whether she was in the exercise of ordinary care, and whether defendant's servants in the operation of the car were negligent at and before the time in question. We are unable to say that the verdict is against the manifest weight of the evidence.

Defendant contends that the court erred in giving the following instruction:

"If from the evidence of the case and under the instructions of the court the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then, to enable the jury to estimate the amount of such damages it is

RAY BROWN, a minor of  
Kathleen Brown, her next  
friend.

Witness.

OVERVIEW COURT,

COOK COUNTY.

GRANITE BATTERY COMPANY,  
a corporation.

Appellant.

THE JURY HAS REACHED THE VERDICT OF THE COURT.

In this case plaintiff recovered a judgment against  
defendant for \$1000 on damages for injuries received by her  
while visiting defendant's home. Plaintiff was injured by a  
fall from a porch and sustained by her head. Defendant con-  
tends that (1) the verdict is against the weight of  
the evidence, (2) the court erred in the instructions to the  
jury, and (3) the damages are excessive. At the time of the  
trial defendant, plaintiff was about thirty years old.

The jury was in a better position than this court

to determine from the evidence, including the testimony of  
the plaintiff, together with the other facts and circumstances  
in evidence, whether she was in the exercise of ordinary  
care, and whether defendant's conduct in the operation of  
the car was negligent or not before the time in question.  
It was unable to say that the verdict is against the weight  
of the evidence.

Therefore it is held that the court acted in giving

the following instructions:

"If from the evidence it has been shown that the  
instructions of the court are correct and that the  
jury has found that the plaintiff has been injured  
and that the defendant is liable therefor, the  
jury is authorized to award such damages as it  
deems proper."



not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the business affairs of life."

Said instruction is objected to because it refers to plaintiff's declaration wherein it is alleged that the injuries complained of will for the rest of her life, disable plaintiff from attending to her affairs and business.

A similar instruction in a case brought by an adult was approved in North Chicago Street R. R. Co. v. Fitzgibbons, 180 Ill. 466, wherein the declaration contained an allegation (not set forth in said opinion) that plaintiff, because of the injuries complained of, was "hindered and prevented from transacting her business affairs."

In the instant case there was no attempt to establish a basis for damages except for suffering. It was admitted by plaintiff's attending physician that there was no permanent injury. It seems improbable in this state of the record that the jury were led to consider anything other than pain and suffering endured by plaintiff, and the amount of the verdict does not indicate that they did. We cannot assume that the jury acted upon the theory that there was a permanent injury, and no such inference can be legitimately drawn from the evidence. We do not think, therefore, that the giving of such instruction was reversible error.

The injury complained of was a fracture of the neck of the right humerus. The evidence tended to show a union of the fragments of bone at point of fracture, and at the time of the trial, (nearly three years following the date of the injury) some limitation of motion. We do not think the verdict excessive. The judgment of the Superior Court should be affirmed.

AFFIRMED.



not necessary that any witness should have witnessed  
an opinion as to the amount of such damages, but the  
jury may themselves make such estimate from the facts  
and circumstances in issue, and by considering them in  
connection with their knowledge, experience and  
opinion in the business affairs of life."

Such testimony is admissible as evidence of facts

to plaintiff's damages where it is alleged that the  
defendant committed all the acts of tort, and the  
plaintiff's damages are not certain and permanent.

A similar instruction in a case brought by an adult  
was approved in Smith v. Smith, 111 U.S. 127, 4 S.Ct. 101, 34 L.Ed. 248, wherein the declaration contained an allegation  
(not set forth in said opinion) that plaintiff, because of the  
tortious conduct of, and "hindrance and prevention from  
conducting her business affairs."

In the instant case there was no attempt to establish  
a basis for damages except for tortious. It was alleged by  
plaintiff's attending physician that there was no permanent  
injury. It seems probable in this state of the record that  
the jury were led to consider anything other than pain and  
suffering caused by plaintiff, and the amount of the verdict  
does not indicate that they did. It cannot be said that the  
jury acted upon the theory that there was a permanent injury,  
and so such inference can be reasonably drawn from the  
evidence. It is not likely, therefore, that the giving of  
such instruction was reversible error.

The injury complained of was a fracture of the  
bone of the right forearm. The evidence tended to show  
a union of the fragments at some point of fracture, and  
at the time of the trial, (nearly three years following  
the date of the injury) some limitation of motion, as the  
fact of the right forearm. The judgment of the  
superior court should be affirmed.

GUSTAVE A. OEHLER,  
Plaintiff in Error,

vs.

CHARLES BRAND,  
Defendant in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 415

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action in replevin. At the close of plaintiff's evidence the court directed a verdict in favor of defendant and entered judgment thereon for possession of the replevied chattels.

The main question presented for determination is - was there a valid delivery to plaintiff of a certain chattel mortgage executed by defendant, conveying to plaintiff, as grantee, the chattels in question? The undisputed evidence is that said chattel mortgage purporting to be given to secure the payment to plaintiff of defendant's promissory note for \$360, together with said note, was given to a certain A. J. Schoenecke, for conditional delivery. Among other conditions it was agreed by the parties that said mortgage and note were to be held by the escrowee until defendant and plaintiff would direct him to deliver same to plaintiff. Contrary to such condition the mortgage and note in question were delivered by said escrowee to plaintiff without the knowledge, direction or consent of defendant. It is manifest that such delivery was wholly ineffectual to pass title to plaintiff. Stanley v. Valentine et al., 79 Ill. 544. The chattel mortgage in question could not have become operative until all of the conditions of the escrow agreement had been complied with. Burnap v. Sharpsteen et al., 149 Ill.

CHAS. HARRIS, Defendant in error,  
 vs.  
 GEORGE A. GORDON, Plaintiff in error.

204 I.A. 415

This was an action in replevin. At the close of plaintiff's evidence the court directed a verdict in favor of defendant and entered judgment thereon for possession of the replevied chattels.

The main question presented for determination is - was there a valid delivery to plaintiff of a certain chattel mortgage executed by defendant, conveying to plaintiff, as grantee, the chattels in question? The undisputed evidence is that said chattel mortgage purporting to be given to secure the payment to plaintiff of defendant's promissory note for \$500, together with said note, was given to a certain A. J. Buchanan, for conditional delivery. Under other conditions it was agreed by the parties that said mortgage and note were to be held by the addressee until defendant and plaintiff would direct him to deliver same to plaintiff. As to such condition the mortgage and note in question were delivered by said addressee to plaintiff without the mortgage, dissection or consent of defendant. It is sufficient that such delivery was wholly unauthorized to pass title to plaintiff. Stanley v. Volantien, 147, 70 Ill. 844. The chattel mortgage in question could not have become operative until all of the conditions of the action were met.

225; Grindle et al. v. Grindle et al., 240 Ill. 143.

As plaintiff predicated his right of possession wholly upon said note and chattel mortgage, and as no title to the property in question passed with the wrongful delivery of said instruments, an action of replevin under such circumstances cannot be maintained. The judgment of the Municipal Court is affirmed.

AFFIRMED.



205; Briggs et al. v. Briggs et al., 140 Ill. 143.

no plaintiff exercised his right of possession

which was sold with the other property, and as no title

to the property is shown passed with the wrongfully delivered

of said instruments, an action of replevin under such

circumstances cannot be maintained. The judgment of the

Appellate Court is affirmed.

ATTORNEY.

LOUIS GOLDSTEIN,

Defendant in Error,

vs.

DOMONICK MARUBIO and  
JAMES L. MORRIS,

Plaintiffs in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 417

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an action in replevin brought by Louis Goldstein against Domonick Marubio and James L. Morris. The court found the right of possession of the property replevied in plaintiff, and entered judgment against defendants on such finding.

Plaintiff in response to an advertisement, called on defendant Marubio on Sept. 15, 1914, in regard to the purchase of two wagons offered for sale by the latter. He testified that Marubio at that time stated to plaintiff that he had only one wagon then in his possession; that plaintiff had an understanding with Marubio that the latter would loan to plaintiff a wagon in lieu of the one missing, and if within a reasonable time thereafter Marubio could deliver to plaintiff the original wagon in good condition, he would pay the latter \$50 for both wagons; that he then paid Marubio \$5 on account of such purchase, took possession of both wagons and within 5 or 6 days returned to defendant the borrowed wagon, retaining the other. Three weeks later plaintiff paid Marubio \$20, which he said Marubio accepted as payment in full for the wagon retained, although the latter's receipt given therefor to plaintiff, and introduced in evidence, does not so indicate.

Marubio testified that at the time in question he had in his possession both wagons which he had advertised

THE COURT OF APPEALS  
IN THE CITY OF NEW YORK

IN SENATE  
JANUARY 1, 1910

IN SENATE

THE COURT OF APPEALS IN SENATE

This is an action in replevin brought by Louis  
Weinstein against Isaacson, Harris and James A. Harris.  
The court found the right of possession of the property re-  
plevied in plaintiff, and entered judgment against defendants  
on such finding.

Plaintiff in response to an advertisement, called  
on defendant Harris on Sept. 13, 1909, in regard to the  
purchase of two wagons offered for sale by the latter. He  
testified that Harris at that time stated to plaintiff that  
he had only one wagon then in his possession; that plain-  
tiff had an understanding with Harris that the latter would  
loan to plaintiff a wagon in lieu of the one missing, and  
it within a reasonable time thereafter Harris would deliver  
to plaintiff the original wagon in good condition, he would  
pay the latter \$25 for both wagons; that he then paid  
Harris \$25 on account of each purchase, took possession of  
both wagons and within 5 or 6 days returned to defendant the  
returned wagon, retaining the other. Thereafter plain-  
tiff said Harris told him, which he said Harris repeated  
as follows in full for the record, although the  
latter's recollection given in plaintiff's and defendant's  
in evidence, does not so indicate.



for sale; that plaintiff purchased same for \$50, paying \$5 on account thereof, and said he would return and pay Marubio \$45, the balance of said purchase price. Another receipt from Marubio to plaintiff was admitted in evidence, showing payment of \$5, and indicating the sale of two wagons for \$50. Marubio further testified that during his absence, plaintiff returned to Marubio's barn, taking both wagons, without leaving the balance of the purchase price therefor; that about two months thereafter, he demanded of plaintiff the balance of the purchase price or return of the wagons; that plaintiff thereupon paid him \$20 and promised payment of balance within a few days; that the following day Marubio found the "poorer" of the two wagons outside of the latter's barn; that some days later, upon refusal of plaintiff to make payment, Marubio took possession of the remaining wagon.

About 9 or 10 months thereafter, viz., Aug. 1915, defendant Morris purchased from Marubio the wagon in question without notice of any claim thereto by plaintiff. During the same month, plaintiff took the wagon from the possession of Morris, presumably during the latter's absence, resulting in the former's arrest. The court, in the proceeding which followed, directed plaintiff to return the wagon to Morris, which he did, and thereafter replevied same.

While there is a conflict of evidence as to the terms of the purchase, it is apparent that Marubio in taking back the wagon in question thereby treated the contract as rescinded; plaintiff impliedly acquiesced in considering the contract as rescinded, for he took no action in relation to same, from Nov. 1914 to Aug. 1915, at which latter time, he took the wagon from defendant Morris, an innocent purchaser, to whom he was directed by order of court to return same, as



For sale; that plaintiff purchased same for \$100, paying  
in on account thereof, and said he would receive the balance  
thereof in 1912, the balance of said purchase price. Plaintiff  
received from defendant no receipt for the balance of the purchase  
price of \$100, and indicating the date of the  
payment for \$100. Plaintiff further testified that during the  
absence, plaintiff returned to defendant's farm, taking with  
himself, without leaving the balance of the purchase price  
thereof; that about two months thereafter, he demanded of  
plaintiff the balance of the purchase price or return of  
the wagon; that plaintiff thereupon paid him \$100 and  
received payment of balance within a few days; that the  
following day plaintiff found the "poor" of the two wagons  
outside of the latter's barn; that some days later, upon  
refusal of plaintiff to make payment, plaintiff took possession  
of the remaining wagon.

About 9 or 10 months thereafter, viz., Aug. 1912,  
defendant Morris purchased from plaintiff the wagon in question  
without notice of any claim thereto by plaintiff. During the  
same month, plaintiff took the wagon from the possession of  
Morris, presumably having the latter's absence, retaining in  
the latter's arrest. The court, in the proceedings which  
followed, directed plaintiff to return the wagon to Morris,  
which he did, and thereafter received same.

While there is a conflict of evidence as to the  
terms of the purchase, it is apparent from the facts in issue  
that the wagon in question was sold to plaintiff as  
rescued; plaintiff implicitly acknowledged in conveying the  
wagon to defendant, that he took no action in relation to  
same, from Nov. 1911 to Aug. 1912, at which latter time, he  
took the wagon from defendant Morris, an innocent purchaser,  
to whom he was directed by order of court to return same, as

above stated. These facts show that plaintiff was not entitled to its possession. The judgment of the Municipal Court is therefore reversed and the cause remanded with directions for a retorno.

REVERSED AND REMANDED WITH DIRECTIONS.

above stated. These facts show that District was not  
entitled to its possession. The judgment of the majority  
Court is therefore reversed and the cause remanded with  
directions for a rehearing.

REVEREND AND HONORABLE JUDGES OF THE DISTRICT COURT.

PHILIP K. RUSSELL,  
Defendant in Error,

vs.

GEORGE S. COCHRAN,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 418

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class brought in the Municipal Court upon a foreign judgment for the recovery of money. Plaintiff in his statement of claim alleged that there was due and owing him from defendants \$962.33 on a certain judgment rendered in plaintiff's favor and against defendants in the District Court of Hennepin County, Minn., on Jan. 3, 1914, as follows:

"Judgment.....	\$1,079.41
Interest for twenty months .....	107.92
	<u>\$1,187.33</u>

By cash paid in partial satisfaction, July 1, 1914.....	225.00
	<u>\$ 962.33"</u>

Plaintiff in his affidavit of claim, recited, in substance, that said cause was a suit upon a contract for the payment of money and that the nature of the claim was as above set forth. A default for want of appearance and judgment for \$962.33 was entered against George S. Cochran, sole defendant in the instant case. Defendant, in an affidavit filed in support of his motion to vacate said judgment and for leave to defend, alleged that said statement of claim was insufficient; that said action was an action in debt; that there was no proper evidence introduced in support of said judgment; that he was never served personally with summons



PLILLI K. HOSKINS, Defendant in Error,

vs.

GEORGE A. DEWEY, Plaintiff in Error.

MUNICIPAL COURT  
OF CHICAGO.

2041 A. 418

MR. JUSTICE MCCORDY DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class brought in the Municipal Court upon a foreign judgment for the recovery of money. Plaintiff in his statement of claim alleged that there was due and owing him from defendant \$462.32 on a certain judgment rendered in plaintiff's favor and against defendant in the District Court of Hennepin County, Minn., on Jan. 3, 1914, as follows:

Payment.....\$1,779.41  
Interest for twenty months.....107.92  
\$1,887.33

By cash paid in partial satisfaction, July 1, 1914.....\$25.00  
\$1,862.33

Plaintiff in his affidavit of claim, recited, in substance, that said cause was a suit upon a judgment for the payment of money and that the merits of the claim were as above set forth. A default for want of appearance and judgment for \$462.32 was entered against George W. Hoskins, sole defendant in the instant case. Defendant, in an affidavit filed in support of his motion to vacate said judgment and for leave to defend, alleged that said statement of claim was false and that said action was an action in tort; that there was no proper evidence introduced in support of said

in the proceedings wherein the foreign judgment was entered and that said judgment was void. Said motion was denied and this writ of error was sued out to review the correctness of said judgment.

In cases of the fourth class it seems manifest that the Municipal Court has jurisdiction in actions of debt, as well as in contract. In the case of Maiss v.

Met. Amusement Ass'n., 146 Ill. App. 196, this court said:

"We think it was clearly the intention of the Legislature to give the Municipal Court jurisdiction in actions of the fourth class in all legal actions, as distinguished from equitable, when the amount claimed does not exceed \$1,000, and not to limit its jurisdiction to actions on contract or for money due or owing."

This was a legal action. The amount of plaintiff's claim did not exceed \$1,000. The nature of the claim as stated was easily understood and we are clearly of the opinion that the Municipal Court had jurisdiction.

Defendant urges as ground for reversal, that no proper evidence was introduced in support of the judgment in the instant case. The rules of the Municipal Court are not before us and in their absence we must presume that the court acted regularly and in accordance with its rules in entering judgment upon plaintiff's affidavit of claim. Goeling v. The MacArthur Co., 181 Ill. App. 373; Edson Keith & Co. v. Keegan et al., 183 Ill. App. 187.

Defendant in his said affidavit failed to show any exercise of diligence or any reason why He did not appear in court when summoned. In the absence of such showing, the court did not abuse its discretion in refusing to set aside said default and to vacate said judgment. Hartford Life & Annuity Ins. Co. v. Rossiter et al., 196 Ill. 277. And this is true even if defendant had a meritorious defense. Plaff v. Pac. Exp. Co., 251 Ill. 243. The judgment of the Municipal Court is therefore affirmed.

**AFFIRMED.**

in the proceedings wherein the Federal Government was entered  
and that said judgment was void. This action was denied and  
this writ of error was made out to review the correctness of  
said judgment.

In case of the fourth claim it seems manifest  
that the Municipal Court has jurisdiction in actions of  
debt, as well as in contract. In the case of Wells v.  
Met. Insurance Co., 103 Ill. App. 102, this court said:

"We think it was clearly the intention of  
the legislature to give the Municipal Court jurisdiction  
in actions of the fourth class in all cases  
as distinguished from equitable, when the amount claimed  
does not exceed \$1,000, and not to limit its jurisdiction  
to actions on contract or for money due or owing."

This was a legal action. The amount of plaintiff's  
claim is not over \$1,000. The nature of the claim as  
stated was easily understood and we are clearly of the  
opinion that the Municipal Court had jurisdiction.

Defendant urges as ground for reversal, that no  
proper evidence was introduced in support of the judgment  
in the instant case. The rules of the Municipal Court are  
not before us and in their absence we may presume that the  
court acted regularly and in accordance with its rules in  
excluding testimony and upon plaintiff's affidavit of claim. Wells  
v. The Metropolitan Co., 101 Ill. App. 373; Wells v. Co.  
v. Waverly St. Co., 103 Ill. App. 187.

Defendant in his brief further relies on the fact  
that of difference of fact between what he did not want to  
admit was immaterial. In the absence of such showing, the  
court did not abuse its discretion in refusing to set aside  
said verdict and to vacate said judgment. Waverly St. Co.  
Waverly St. Co. v. Waverly St. Co., 104 Ill. App. 247. And this  
is true even if defendant had a substantial defense. First  
v. The Metropolitan Co., 101 Ill. App. 187. The judgment of the Municipal



PHILIP K. RUSSELL,	}	
Defendant in Error,		ERROR TO
vs.		MUNICIPAL COURT
GEORGE S. COCHRAN,		OF CHICAGO.
Plaintiff in Error.	}	

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class brought in the Municipal Court upon a foreign judgment for the recovery of money. Plaintiff in his statement of claim alleged that there was due and owing him from defendants \$962.33 on a certain judgment rendered in plaintiff's favor and against defendants in the District Court of Hennepin County, Minn., on Jan. 3, 1914, as follows:

"Judgment.....	\$1,079.41
Interest for twenty months .....	107.92
	<u>\$1,187.33</u>

By cash paid in partial	
satisfaction, July 1, 1914.....	225.00
	<u>\$ 962.33"</u>

Plaintiff in his affidavit of claim, recited, in substance, that said cause was a suit upon a contract for the payment of money and that the nature of the claim was as above set forth. A default for want of appearance and judgment for \$962.33 was entered against George S. Cochran, sole defendant in the instant case. Defendant, in an affidavit filed in support of his motion to vacate said judgment and for leave to defend, alleged that said statement of claim was insufficient; that said action was an action in debt; that there was no proper evidence introduced in support of said judgment; that he was never served personally with summons



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THE UNIVERSITY OF CHICAGO PRESS

It is an action of the fourth class brought in the Circuit Court of the United States for the District of Columbia, and is a bill in equity for the recovery of money. Plaintiff in his statement of claim alleged that there was due and owing him from defendant \$662.25 on a certain judgment rendered in plaintiff's favor and against defendant in the District Court of Hampshire County, New Hampshire, on the 12th day of January, 1911, and that defendant had failed to pay the same.

[illegible]

09-1687 ..... 124X, 124Y, 124Z, 124A

There was no proper evidence introduced in support of said testimony; that said action was not taken in haste; that

in the proceedings wherein the foreign judgment was entered and that said judgment was void. Said motion was denied and this writ of error was sued out to review the correctness of said judgment.

In cases of the fourth class it seems manifest that the Municipal Court has jurisdiction in actions of debt, as well as in contract. In the case of Maiss v. Met. Amusement Ass'n, 146 Ill. App. 196, this court said:

"We think it was clearly the intention of the Legislature to give the Municipal Court jurisdiction in actions of the fourth class in all legal actions, as distinguished from equitable, when the amount claimed does not exceed \$1,000, and not to limit its jurisdiction to actions on contract or for money due or owing."

This was a legal action. The amount of plaintiff's claim did not exceed \$1,000. The nature of the claim as stated was easily understood and we are clearly of the opinion that the Municipal Court had jurisdiction.

Defendant urges as ground for reversal, that no proper evidence was introduced in support of the judgment in the instant case. The rules of the Municipal Court are not before us and in their absence we must presume that the court acted regularly and in accordance with its rules in entering judgment upon plaintiff's affidavit of claim. Goßing v. The MacArthur Co., 181 Ill. App. 373; Edson Keith & Co. v. Keewan et al., 183 Ill. App. 187.

Defendant in his said affidavit failed to show any exercise of diligence or any reason why he did not appear in court when summoned. In the absence of such showing, the court did not abuse its discretion in refusing to set aside said default and to vacate said judgment. Hartford Life & Annuity Ins. Co. v. Rossiter et al., 196 Ill. 277. And this is true even if defendant had a meritorious defense. Plaff v. Pac. Exp. Co., 251 Ill. 243. The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

in the proceedings against the defendant judgment was entered  
and that said judgment was void. This motion was denied and  
this writ of error was overruled to leave the defendant in  
said judgment.

In view of the facts above it seems evident  
that the defendant could have participated in action of  
said court as in and to said court. In view of said  
fact, defendant's appeal, 100 Ill. App. 100, will be overruled.

It is shown that the defendant  
the defendant to give the defendant's judgment  
in action of the court above in all legal  
as distinguished from said action, when the court decided  
that the defendant was not liable for the judgment  
the action on contract as for money due or owing.

This was a legal action. The amount of plaintiff's  
claim did not exceed \$1,000. The nature of the claim was  
action on contract and as such within the jurisdiction of the  
circuit court of Cook County, Illinois.

Defendant's appeal is taken for reversal, and on  
proper grounds and reasons in support of the judgment  
in the instant case. The facts of the defendant's case are  
not before us and in their review we must assume that the  
court acted regularly and in accordance with the rules in  
entering judgment upon plaintiff's affidavit of claim. People

v. The American Bk. Co., 101 Ill. App. 100; People v. Co.  
v. People of Ill., 103 Ill. App. 100.

Defendant in his brief attempts to show that  
existence of ill-will on the part of the court in  
this case was shown. In the review of such evidence, the  
court did not show the disposition to reverse in such cases  
said defendant and to reverse said judgment. People v. Co.  
People v. Co., 101 Ill. App. 100; People v. Co., 103 Ill. App. 100.

It is clear that the defendant's motion for reversal  
v. People of Ill., 101 Ill. App. 100. The judgment of the circuit



HERMAN HOLLATZ et al.,  
Appellants,

vs.

FREDERICK H. GERBERDING et al.,  
Appellees.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

204 I.A. 419

MR. PRESIDING JUSTICE McSURNLY

DELIVERED THE OPINION OF THE COURT.

Complainants by bill sought to have defendant Gerberding enjoined from building a garage on Chicago avenue, alleging noncompliance with a city ordinance relating to the location of garages. Upon hearing by the chancellor it was ordered that the bill be dismissed for want of equity, from which complainants appeal.

The material provisions of the ordinance claimed to have been violated are -

"Nor shall any person, firm or corporation locate, build, construct or maintain any garage, in the city, in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block without the written consent of the majority of the property owners according to the frontage on both sides of the street. \* \*, \* Provided, that in determining whether two-thirds of the building on both sides of such street were used exclusively for residence purposes any building fronting upon another street and located upon a corner lot shall not be considered."

While it is proposed to build the garage in question fronting upon Chicago avenue, it is located within 100 feet of Menard avenue, and the controversy centers around the character of Menard avenue in the block running south from Chicago avenue to Superior street. It is claimed by complainants that two-thirds of the buildings in this block are used exclusively for residence purposes, and



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Complaints by all men to have identical  
experiences during the war on Chicago ave-  
nue, including numerous cases with a great number relating  
to the history of the city. Upon hearing by the committee  
it was decided that the bill be amended the way of which  
the bill committee agreed.

The various provisions of the proposed bill  
to have been violated are -

"and shall not be subject to any restriction  
other than that of the city of Chicago, in  
the case of any block in which the city of  
Chicago is located, or within one block  
of any such street in any other city or  
out the whole content of the report of the prop-  
erty owner appearing in the records on each side  
of the street, and provided, that in determining  
whether two-thirds of the building on each side of  
such street are used exclusively for business pur-  
poses any building containing more than one story and  
located upon a corner lot shall not be considered."

It is proposed to build the house in  
Chicago, Illinois upon Chicago avenue, it is located with-  
in the city of Chicago, and the committee desires  
to know the number of houses on each side of  
such street as to whether street. It is desired  
by committee that two-thirds of the buildings in this  
block are used exclusively for business purposes, and

that therefore under the provisions of the ordinance the garage cannot be built without frontage consents.

What buildings in this block should be counted? There are only four of them, two on each side of the street, and all four standing upon corner lots. Clearly those on the two corners of Chicago avenue and Menard avenue front on both streets. They are occupied by stores with entrances on the corner and show windows on each street. There is no question as to the frame residence on the northeast corner of Menard and Superior; it clearly fronts on Superior. It follows, therefore, that in determining the character of occupancy none of these three buildings should be counted under the proviso of the ordinance excluding "any building fronting upon another street and located upon a corner lot."

It is not so easy to characterize the flat building at the northwest corner of Menard and Superior. We are not led to conclude that the building should be considered as used for business because a physician, occupying one of the apartments, received and treated patients therein, or had his name in the window.

This building has a frontage of 40 feet on Superior and 117 feet on Menard. It has two entrances, both on Menard, none on Superior. It might properly be said that such a building fronts on Menard because of the entrances on that street. But does it necessarily follow that it does not also front on Superior? In other words, does the location of the entrance alone determine upon which street a corner building fronts? The only reported case in point to which we are referred is In re Dinmick and McCallum, 26 Ontario Law Reports 551, where the court said:

"Any side or face of a building is a front,

that, therefore, under the provisions of the ordinance the  
message cannot be built without the necessary consent.  
That building in this block cannot be completed  
there are only four of them, two on each side of the street,  
and all four standing upon corner lots. Building fronts on  
the two corners of Chicago street and every other front on  
both streets. They are bounded by fences with entrances on  
the corner and two windows on each street. There is no  
question as to the front building on the northeast corner  
of Chicago and Superior; it is a front front on Superior. It  
follows, therefore, that in determining the character of the  
building back of these three buildings would be counted  
against the provision of the ordinance stating "any building  
fronting upon a street shall be located upon a corner lot."  
It is not so much an observation as the fact  
building at the northeast corner of Chicago and Superior. We  
are not so much as to say that the building is a building  
and we have the building because a building, according  
one of the ordinance, located and placed within the street  
is, as that is now in the window.  
This building was a front of 20 feet on the  
corner and 17 feet on Superior. It has two entrances, each  
on a street, one on Superior. It is a building properly so called that  
such a building fronts on Superior because of the entrance on  
that street. But what if we say that it is a building  
and that it is a building? Is a building, then, the four-  
also of the ordinance which states that a building shall  
corner building fronts. The rule is that a building  
so that we are referred to in the ordinance and ordinance.  
So that the building is, where the words said:  
"any side or face of a building is a front."



although the word is more commonly used to denote the entrance side. New England Dict. sub. voc. Front, page 563; Col. 3, Para. 6. Back front, rear front, the four fronts, of a house, are all terms in common use, and there is no reason why a building should not 'front' on two, three or four streets."

And again -

"While a building at the corner of two streets is numbered on the street upon which its main entrance fronts, and is in common parlance spoken of as 'on that street,' it also lies along or borders on the other street, and in the relation of envioning is also on that street, and such street would also be in front of that part of the building adjoining it."

We might feel inclined to the same view if necessary to a decision in this case, but the propriety of the decree under consideration need not rest upon this point.

A conclusive ground in support of the decree of the chancellor is that it was shown that defendant Gerberding had secured the consents of the majority of the property owners according to frontage on both sides of Menard avenue. We do not agree with complainants' contention as to the construction of this provision of the ordinance. We are of the opinion that the language clearly indicates that while in determining the residential character or otherwise of the block, the corner lots are not to be considered, yet when consents are to be obtained the entire frontage, including the corner lots, are to be counted.

The defendant secured the consents of the owners of the frontage on the east side of Menard avenue, but not on the west side. Ordinarily this would not be a majority of the frontage on both sides, but the evidence proves beyond dispute that in this particular block the frontage on the east side is greater than on the west side of the street; the difference in favor of the east side of the street is apparently about four feet. This is not definite, but that





there is an excess on the east side is not denied, and any excess on this side would give the defendant a majority of the frontage on both sides.

It follows from what we have said that we are of the opinion that the chancellor properly dismissed the bill for want of equity, and the decree is affirmed.

AFFIRMED.

There is an excess on the right side of the balance sheet, and the  
excess is on the right side of the balance sheet, and the  
excess is on the right side of the balance sheet.

It follows from what we have said that we are  
of the opinion that the company's assets are  
all in the hands of equity, and the balance is nil.

WATKINS.

(to)  
H. KLAVERN,

vs.

ISAAC STEIN,

Appellee,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 421

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff, alleging damages by reason of the breach by defendant of a contract to sell plaintiff a quantity of men's underwear, upon trial by the court had judgment for \$148.75, which defendant seeks to have reversed.

Without detailing all of the conversation between the parties, which was bargaining talk, it is sufficient to say that the court could properly find that the parties finally arrived at a definite agreement by which the defendant sold to the plaintiff 170 dozens of men's underwear at \$3.12½ per dozen; that defendant was to deliver them to plaintiff's place of business, and after they were "checked up" the money was to be paid.

This being the contract of the parties, it was unnecessary, as is argued by counsel for the defendant, that plaintiff should have first made a tender of the payment. Cases holding that under other circumstances it is incumbent upon the purchaser to make a tender of payment are not in point. Plaintiff was not bound to pay until the goods were delivered and counted.

The fact that defendant failed to carry out this agreement with plaintiff, but sold the lot to other parties, is not in dispute.

The contract claimed by plaintiff is clearly



N. ALVAREZ,

Appellant,

vs.

ISAAC STAIN,

Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

20414.421

MR. PRESIDING JUSTICE ROBERTY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff, alleging damages by reason of the breach by defendant of a contract to sell plaintiff a quantity of men's underwear, upon trial by the court and judgment for \$148.75, which defendant seeks to have reversed. Without detailing all of the conversation between the parties, which was bargaining talk, it is sufficient to say that the court could properly find that the parties finally arrived at a definite agreement by which the defendant sold to the plaintiff 170 dozens of men's underwear at \$3.12 1/2 per dozen; that defendant was to deliver them to plaintiff's place of business, and after they were "checked up" the money was to be paid. This being the contract of the parties, it was unnecessary, as is argued by counsel for the defendant, that plaintiff should have first made a tender of the payment. Cases holding that under other circumstances it is immaterial upon the purchaser to make a tender of payment are not in point. Plaintiff was not bound to pay until the goods were delivered and counted. The fact that defendant failed to carry out this agreement with plaintiff, but sold the lot to other parties, is not in dispute. The contract claimed by plaintiff is clearly

supported by the preponderance of the evidence, and he is entitled to recover the damages which it has been shown he suffered. The judgment is affirmed.

**AFFIRMED.**

supported by the preponderance of the evidence, and he is  
entitled to recover the damages which it has been shown he  
suffered. The judgment is affirmed.

AFFIRMED.

DAVID B. JONES,  
Appellant,  
vs.  
RENAULT SEVELING BRANCH,  
a corporation,  
Appellee.

Filed March 26, 1917  
APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

204 I.A. 422

MR. PRESIDING JUSTICE MCGURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a deposit of \$1,500 made by him on a contract for the purchase of an automobile which, after inspection, he had refused to accept. Upon trial the jury returned a verdict adverse to his claim, and judgment was entered for the defendant, from which plaintiff appeals.

In October, 1913, plaintiff contracted with defendant for a new automobile - Renault chassis, made in France - price \$7,500. At the time of the contract the car was in the New York sales room. Upon its arrival at defendant's place of business in Chicago it was inspected by plaintiff's chauffeur and other experienced persons, who advised plaintiff that the chassis was not new. A test was then made to determine the condition of its mechanism, and as a result of this plaintiff notified defendant that the chassis was not in accordance with the contract, that on account of failure of the defendant to comply therewith the contract was canceled, and the return of the deposit was requested. This was refused, and suit followed.

The variant testimony upon the trial related for the most part to the mechanical parts of the chassis, the





plaintiff seeking to show that these were so worn as to indicate that it was an old and used car and that it failed to meet the obligation of the defendant to furnish a new car. The defendant sought by testimony to show that there was only that normal degree of wear incident to the usual tests to which a new car is subjected and to its necessary movements in construction, assembling and marketing. Plaintiff introduced testimony tending to show that the degree of wear was such as to indicate that the chassis had been run eight to ten thousand miles - which amount of wear would obviously take the chassis out of the class designated as new. There was also testimony that the car left the factory in France in September, 1912, arrived in New York in November, 1912, and had been offered for sale from this time to the time of the contract with plaintiff in October, 1913. If the jury gave credence to plaintiff's testimony, a verdict favorable to him would properly have followed, unless such result was prevented by improper instructions.

At the request of the defendant the court gave to the jury instruction No. 2 as follows:

"You are instructed that the burden is upon the plaintiff to prove his case by a preponderance or greater weight of the testimony. So in this case the burden is upon the plaintiff to prove by a preponderance or greater weight of the testimony that the chassis furnished by the defendant under the contract with the plaintiff was a used or second-hand chassis, and unless the plaintiff so shows by a preponderance of greater weight of the testimony, he cannot recover and you should find the issues for the defendant."

This is misleading and should not have been given. From the evidence the jury could reasonably understand that "a used or second-hand chassis" was one that before that time had been sold to or used by a purchaser. Ordinarily such a car is so designated. It was not claimed by plaintiff that the chassis was of this kind, and as there



was no proof of any prior sale, the jury was bound by the instruction to find the issues for the defendant. The important elements of age and wear were wholly omitted.

For the same reason it also was reversible error to give at defendant's request instruction No. 3, which

is: "You are instructed that the plaintiff must show by a preponderance of a greater weight of the testimony that the chassis provided for the plaintiff by defendant was a used or second-hand chassis."

"You are further instructed that a chassis which has been run only for the purpose of testing the chassis, showing to prospective purchasers, moved from place to place for the purpose of having equipment provided, and similar purposes, is not a used or second-hand chassis."

Plaintiff was entitled to receive a new car, virtually free from wear in its mechanical parts, and defendant cannot avoid its obligation to furnish such a car by showing that the wear in the chassis was produced by showing it to prospective purchasers or moving it from place to place for the purpose of having equipment provided, "and similar purposes." It is conceivable that by considerable use for these purposes alone a car could be so worn as materially to impair operation.

Defendant's instruction No. 4 is open to the same criticism by telling the jury, in effect, that even if these particular uses wore the chassis to the breaking point plaintiff was not entitled to recover. Plaintiff based his claim upon evidence showing age and wear from whatever cause or uses, and if the jury should believe that these had been shown to a greater degree than reasonably should be in a new car of this kind and price, he was entitled to recover.

It is suggested by counsel for plaintiff that





defendant sold the car in question five or six months after suit was brought, and that this amounts to a rescission justifying this court in entering judgment for the plaintiff. We cannot do this. Where no supplemental pleadings have been filed the rights of the parties must be determined according to the facts existing at the time the action was commenced. Hutchinson v. Coonley, 209 Ill. 457.

For the reasons above indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.



JOHN YANGAS,

Appellant,

vs.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MAX WEINSCHENK, JOHN SHUER-  
GER, JOHN I. BARTLEY and THE  
NORTH SIDE STATE SAVINGS BANK,  
Appellees.

204 I.A. 424

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Complainant filed a creditor's bill on a judgment recovered by him on December 8, 1914, against the defendant Weinschenk. It was alleged that Weinschenk was the owner of an undivided one-third interest in the Dearborn Baking Company and in its bank account kept in the North Side State Savings Bank. The bank answered admitting a deposit to the credit of the Dearborn Baking Company but asserted that it did not know that Weinschenk was interested therein. The other defendants, Shuerger and Bartley, answered denying that Weinschenk was a copartner in the Dearborn Baking Company. The cause was referred to a master in chancery who, after hearing evidence, made a report recommending that the bill be dismissed for want of equity. Upon hearing before the chancellor upon exceptions to the master's report, these were overruled and a decree entered dismissing the bill. From this complainant appeals.

From the evidence in the record we hold that the master and chancellor properly found that the three defendants, Weinschenk, Shuerger and Bartley, on February 25, 1914, entered into a written copartnership to do business under the firm name of Dearborn Baking Company for a period of five



JOHN YAGAS,

Appellant,

vs.

MAX WEINSCHEK, JOHN SHUTZ-  
GER, JOHN I. BARTLEY and THE  
NORTH SIDE STATE SAVINGS BANK,  
Appellees.

COOK COUNTY.

APPEAL FROM SUPERIOR COURT.

2041A.424

MR. PRESIDING JUSTICE MCBURNLEY  
DELIVERED THE OPINION OF THE COURT.

Complainant filed a creditor's bill on a judgment recovered by him on December 8, 1914, against the defendant Weinschenk. It was alleged that Weinschenk was the owner of an undivided one-third interest in the Dearborn Baking Company and in its bank account kept in the North Side State Savings Bank. The bank answered admitting a deposit to the credit of the Dearborn Baking Company but asserted that it did not know that Weinschenk was interested therein. The other defendants, Shuetzer and Bartley, answered denying that Weinschenk was a copartner in the Dearborn Baking Company. The cause was referred to a master in chancery who, after hearing evidence, made a report recommending that the bill be dismissed for want of equity. Upon hearing before the chancellor upon exceptions to the master's report, same were overruled and a decree entered dismissing the bill. From this complaint appeals.

From the evidence in the record we hold that the master and chancellor properly found that the three defendants, Weinschenk, Shuetzer and Bartley, on February 25, 1914, entered into a written copartnership to do business under the firm name of Dearborn Baking Company for a period of five

years, but that should any of the partners desire to withdraw the others should have the right to purchase such interest; that at the time of entering into this agreement Shuerger advanced \$600 and Bartley \$300, but as Weinschenk was unable to advance cash, his share was advanced by Shuerger, and that to secure Shuerger, Weinschenk executed a note dated February 28, 1914, to the order of Shuerger, promising to pay him \$300, and as security for the payment of this, Weinschenk's interest in the Dearborn Baking Company was transferred by proper words of assignment upon the note, with authority to Shuerger to sell said interest on failure of payment of the note. The note was due on demand, and on or about August 29, 1914, Weinschenk having failed to pay said \$300 or any part thereof, by endorsement made upon the back of the note he assigned and quit-claimed to Shuerger, in consideration of the note being canceled, all his interest in the Dearborn Baking Company. Thereupon the name of Weinschenk was erased from the agreement of copartnership, and it was provided that Shuerger should bear two-thirds of the profits and losses and Bartley one-third. Before this time Weinschenk was authorized to sign checks, but after his transfer of his interest to Shuerger he ceased to have this authority. His only connection with the company thereafter was as a clerk upon a salary.

We have considered the testimony concerning statements made by Shuerger in November, 1914, to the representative of R. G. Dun & Company, but find nothing therein which could be construed as a statement that Weinschenk was at that time a partner. There was certain other testimony as to admissions made by Shuerger as to

years, but that should say of the persons who are to draw the others should have the right to purchase upon interest; that at the time of entering into this agreement Shuergar advanced \$500 and Bartley \$250, but as Weinbaum was unable to advance cash, his share was advanced by Shuergar, and then to secure Shuergar, Weinbaum executed a note dated February 28, 1914, to the order of Shuergar, promising to pay him \$500, and as security for the payment of this, Weinbaum's interest in the Portland Bakin Company was transferred by proper words of assignment upon the note, with authority to Shuergar to sell said interest on failure of payment of the note. The note was due on demand, and on or about August 29, 1914, Weinbaum having failed to pay said \$500 or any part thereof, enforcement made upon the back of the note as assigned and distributed to Shuergar, in consideration of the note being canceled, all his interest in the Portland Bakin Company. Thereupon the name of Weinbaum was erased from the agreement of copartnership, and it was provided that Shuergar should bear two-thirds of the profits and losses and Bartley one-third. Before this time Weinbaum was authorized to sign checks, but after his transfer of his interest to Shuergar he ceased to have this authority. His only connection with the company thereafter was as a stockholder.

We have considered the testimony concerning statements made by Shuergar in November, 1914, to the representative of H. B. Dan & Company, but find nothing therein which could be construed as a statement that Weinbaum was at that time a partner. There was certain other testimony as to admissions made by Shuergar as to



Weinschenk's interest, which are denied by Shuerger. We have also considered the testimony tending to cast doubt upon the date of the endorsement made upon Weinschenk's note, and also the other variant testimony presented before the master. We are of the opinion that upon consideration of the entire record the master was justified in finding that the partnership between the defendants Shuerger, Bartley and Weinschenk was terminated on or about the 29th day of August, 1914, and that thereafter Weinschenk had no further or other interest in the business except as an employe upon a weekly salary, and that at the time of the commencement of the suit the partnership was not indebted to Weinschenk, and that Weinschenk had no interest in the bank account kept by the Dearborn Baking Company in the North Side State Savings Bank.

A few days after the bill was filed a receiver was appointed of the property belonging to Weinschenk and it was ordered that the defendants assign the interest of Weinschenk in the Dearborn Baking Company to the receiver. Afterwards they were ruled to show cause why they should not be held guilty of contempt of court in interfering with the receiver. The master recommended that the injunction restraining the North Side State Savings Bank from paying moneys held in the name of the Dearborn Baking Company be dissolved, and that the rule to show cause why the defendants should not be punished for contempt of court should be discharged. The chancellor in approving and confirming the master's report entered the orders recommended.

We hold that the orders of the chancellor were proper and that the bill of complaint was rightly dismissed. The decree is therefore affirmed.

**AFFIRMED.**



Witness's interest, which was denied by the witness. The  
have also considered the testimony bearing to the fact  
upon the date of the contract made upon Witness's  
note, and also the other various testimony presented be-  
fore the court. We are of the opinion that upon examina-  
tion of the entire record the matter was justified in find-  
ing that the partnership between the defendant's partner,  
Earley and Witness was terminated on or about the 15th  
day of August, 1914, and that thereafter Witness had no  
further or other interest in the business except as an em-  
ployee upon a weekly salary, and that at the time of the con-  
tract of the suit the partnership was not intended to  
terminate, and that Witness had no interest in the bank  
account kept by the Western Building Company in the North  
State Savings Bank.

A few days after the bill was filed a receiver  
was appointed of the property belonging to Witness and  
it was ordered that the defendant assign the interest of  
Witness in the Western Building Company to the receiver.  
Afterwards they were tried to show cause why they should not  
be held liable of damages of court in interfering with the  
receiver. The court recommended that the injunction re-  
staining the North State Savings Bank from paying  
money out in the name of the Western Building Company be  
dissolved, and that the rule to show cause why the defend-  
ants should not be punished for contempt of court should  
be dissolved. The chancellor is approving and confirming  
the master's report entered the above recommended.  
He holds that the assets of the receiver were  
proper and that the bill of complaint was rightly dismissed.  
The decree is hereby affirmed.

A. H. BAKER,  
Appellant,  
vs.  
WILLIAM R. MORRISON,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 429

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a balance claimed to be due for professional services as a veterinary surgeon rendered to horses belonging to defendant, pursuant to a contract. It was asserted as a defense that plaintiff had negligently failed to perform this contract, thereby causing defendant's horses to suffer and die, with resultant damages. Upon trial by a jury verdict was returned for the plaintiff in the sum of one dollar upon which judgment was entered. Plaintiff appeals asking that this be reversed.

The material undertaking of the contract, which was in writing, was:

"I propose to doctor twenty-four (24) horses for you by the month for ten dollars (\$10.00) per month, \* \* I to furnish all veterinary services including operations and all necessary medicine."

This was signed by the plaintiff and accepted in writing by the defendant.

We are of the opinion that this contract calls for the personal services of the plaintiff, and that the jury properly could find from the evidence that for a large part of the time the plaintiff did not furnish personal service but sent graduates from a school in which he was an instructor; that at least three horses, during the last four months of the contract, to which period the court restricted evidence

IN SENATE  
JANUARY 11, 1905  
REPORT  
OF THE  
COMMISSIONERS OF THE  
LAND OFFICE  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1904

# REPORT OF THE COMMISSIONERS OF THE LAND OFFICE IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE MAY 1, 1904

The first of the questions presented for consideration by the Senate was that of the propriety of the sale of the land to the plaintiff. It was argued that the sale was not in accordance with the provisions of the act of 1901, which required that the land be sold to the highest bidder. It was also argued that the sale was not in accordance with the provisions of the act of 1902, which required that the land be sold to the highest bidder. The defendant, however, argued that the sale was in accordance with the provisions of the act of 1901, and that the sale was in accordance with the provisions of the act of 1902. The court, in its opinion, found in favor of the plaintiff, and held that the sale was not in accordance with the provisions of the act of 1901, and that the sale was not in accordance with the provisions of the act of 1902.

The second question presented for consideration by the Senate was that of the propriety of the sale of the land to the plaintiff.

was in violation of the provisions of the act of 1901, and

"I propose to accept of the land (100 acres) for you by the State for ten dollars (\$10.00) per acre, and I will furnish all necessary services including operation and all necessary machinery."

This was signed by the plaintiff and accepted in writing by the defendant.

We are of the opinion that this contract was

for the purpose of the sale of the land to the plaintiff, and that the plaintiff was not in violation of the provisions of the act of 1901, and that the plaintiff was not in violation of the provisions of the act of 1902. The court, in its opinion, found in favor of the plaintiff, and held that the sale was in accordance with the provisions of the act of 1901, and that the sale was in accordance with the provisions of the act of 1902.



of mistreatment, died because of negligence in the medical treatment. One horse was taken sick with colic, and, although repeatedly requested to give it attention, neither the plaintiff nor any of his assistants responded to the request; the horse died. There was evidence also of another similar case where the plaintiff failed to attend upon a sick horse which subsequently died. Expert testimony by medical men was given tending to show the proper treatment in such cases, from which the jury properly could have inferred that with such treatment the horses could have been saved. There was also another horse which had been sick for four or five months with a disease which subsequently proved to be glanders. During this time plaintiff did nothing for the horse, and did not inform defendant as to the character of the disease. There was evidence tending to show that glanders is a fatal disease and very infectious. Under the statute relating to animals, chapter 8, veterinary surgeons are required to report all cases of glanders, and horses suffering from this disease are shot. Plaintiff, through his assistant, did not isolate the glanders horse from the other horses in the barn, and it was permitted to drink water out of the trough with others and to be stalled near to valuable black horses. No report of the case was made to the state veterinary by the plaintiff. Subsequently the horse was shot by orders of the state veterinary department because he was suffering from glanders, and also the two other black horses which had been stalled near him.

We are of the opinion that there was abundant evidence to sustain defendant's claim of recoupment.

The abstract does not clearly inform us as to whether defendant filed a claim of set-off or of recoupment,



of excitement, and because of treatment in the medical  
treatment. The horse was taken down with colic, and  
although repeatedly requested to give it attention, neither  
the physician nor any of his assistants responded to the  
request; the horse died. There was evidence also of similar  
similar cases where the physician failed to attend upon a  
sick horse which subsequently died. Several instances by  
medical men was given during the year the proper treatment  
in such cases, from which the jury properly might have in-  
ferred that with such treatment the horses could have been  
saved. There was also evidence which had been given  
for four or five months with a disease which subsequently  
proved to be strangles. During this time physician did  
nothing for the horse, and did not inform defendant as to  
the character of the disease. There was evidence further  
to show that strangles is a fatal disease and very treacher-  
ous. When the strangles relating to animals, Chapter 2,  
veterinary surgeons are required to report all cases of  
strangles, and horses suffering from this disease are sent  
to the mill, through his assistant, did not inspect the  
strangles horse from the other horses in the barn, and it  
was pointed out that when out of the trough with others  
and to be killed (and it was the same horse). The report  
at the time was made in the state veterinary of the horse  
till. Subsequently the horse was shot by order of the State  
Veterinary department because it was suffering from strangles,  
and also the two other sick horses which had been killed  
near him.

He was of the opinion that there was no doubt  
whether to sustain defendant's claim of responsibility.  
The defendant does not claim to have been at the  
mill at the time of the killing of the horse.

and we shall therefore assume the propriety of the judgment for one dollar. In any event, we would not reverse for a technical error in so small an amount.

The judgment is affirmed.

AFFIRMED.

and we shall therefore assume the property of the hypothesis  
 let one follow in any case, as well as covered for a  
 technical error in its own account.  
 The judgment is affirmed.

REPLIES.

CITY ENGINEERING CONSTRUCTION  
COMPANY, a corporation,

Appellant,

vs.

FRANK LOEFFLER and WILLIAM E.  
McCARTHY,

Appellees.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 430

MR. PRESIDING JUSTICE MOSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants claiming damages by reason of an alleged breach by defendants of a contract. Upon trial by the court a finding was entered for the defendants, and judgment thereon, from which plaintiff appeals.

The parties entered into a contract on April 16, 1914, whereby the plaintiff undertook to erect for the defendants certain flat and store buildings in Chicago. The plaintiffs also undertook to procure for the defendants building loans in a considerable amount. The question upon the trial was whether the plaintiff was ready and able to furnish and procure the loans to defendants as provided by the contract.

We are of the opinion that the trial court was justified in concluding that plaintiff had failed to prove its readiness and ability to procure these loans. There was evidence of an attempt by the plaintiff to secure the loans from the Mid City Bank, and there were negotiations with its real estate loan manager to this end. We think it is apparent that the manager was willing to make the loans, but he testified - and it is not in dispute - that Mr. Rathje, the president of the bank, had full and complete authority



ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 01-11-01 BY 60322

OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS  
JANUARY 11, 1901  
CHICAGO, ILLINOIS

2041A.430

IN REPLY TO YOUR LETTER OF THE 10TH INST.  
RE: THE ESTATE OF THE LATE

Plaintiff's motion for summary judgment is denied. The court is of the opinion that the evidence is such that a trial is warranted. The court is of the opinion that the evidence is such that a trial is warranted. The court is of the opinion that the evidence is such that a trial is warranted.

The court is of the opinion that the evidence is such that a trial is warranted. The court is of the opinion that the evidence is such that a trial is warranted. The court is of the opinion that the evidence is such that a trial is warranted. The court is of the opinion that the evidence is such that a trial is warranted. The court is of the opinion that the evidence is such that a trial is warranted.

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upon the subject. Mr. Rathje testified unequivocally that he had rejected the application for these loans; that he did have some talk about them and gave consideration to the matter, but his final and definite conclusion was that the bank would not make the loans.

Plaintiff did not attempt to make any other showing as to its ability to secure the loans, and as it clearly failed to prove its readiness, willingness and ability to perform this part of its contract, it is not entitled to recover damages because of any alleged breach by the defendants.

The judgment is right and is affirmed.

AFFIRMED.



THE STANDARD BREWERY,  
a corporation,  
Appellee,

vs.

PATRICK I. CREEDON,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

204 I.A. 431

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Complainant, Standard Brewery, filed its bill seeking to have reformed or canceled its alleged guaranty of the covenants of a lease, and to enjoin the prosecution of a suit at law thereon brought by the defendant, Patrick I. Creedon, and for general relief. The defendant answered and filed his cross-bill setting up the guaranty and praying for damages thereunder, to which complainant answered. After hearing by the chancellor on the issues thus formed it was decreed that the guaranty be canceled, the complainant discharged from all obligations thereunder, and the defendant was perpetually enjoined from the prosecution of the pending suit or any other on said guaranty. Defendant by this appeal asks that this decree be reversed.

The facts are not seriously in dispute. On April 12, 1903, Alphonso L. Creedon, the owner of certain property in Chicago, entered into a written contract with the Harugari Maennerchor Society (hereinafter called the society) for the leasing of said premises. By one of the provisions of the contract "the said party of the first part (Creedon) further agrees to lease the aforesaid premises including all improvements, to the said second party (the society) for a period of



THE STANDARD BREWERY,  
a corporation,  
Appellee,

vs.

RICHARD I. GREGSON,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

2041A.431

MR. PRESIDING JUDGE MCGURRY

DELIVERED THE OPINION OF THE COURT.

Complainant, Standard Brewery, filed its bill

seeking to have reformed or canceled its alleged guaranty

of the covenants of a lease, and to enjoin the prosecution

of a suit at law thereon brought by the defendant, Richard

I. Gregson, and for general relief. The defendant answered

and filed his cross-bill setting up the guaranty and praying

for damages thereunder, to which complainant answered. After

hearing by the chancellor on the issues thus formed it was

decided that the guaranty be canceled, the complainant dis-

charged from all obligations thereunder, and the defendant was

perpetually enjoined from the prosecution of the pending suit

or any other on said guaranty. Defendant by this appeal asks

that this decree be reversed.

The facts are not seriously in dispute. On April

12, 1903, Alphonse I. Gregson, the owner of certain property

in Chicago, entered into a written contract with the Wernegart

Wannacher Society (hereinafter called the society) for the

leasing of said premises. By one of the provisions of the

contract the said party of the first part (Gregson) further

agrees to lease the aforesaid premises including all improve-

ments, to the said second party (the society) for a period of

twenty years." The annual rental was fixed "for the first two years of said period, and \$1,800.00 per annum for the remaining 18 years \* \* except as hereinafter otherwise provided." Further the contract provides "that the rental value of the premises herein described shall be estimated at the close of each and every five-year period during the entire term of this agreement, said estimate to be made by a Board," one member to be named by each of the parties, who, if unable to agree upon the rental value, should name a third member of the Board, and a majority should determine the rental value. It was also further provided that the society should furnish a surety "guaranteeing the payment of the rents to accrue under this agreement for the first five-year period thereof," and if the lessor demanded a surety for the second five-year period the society agreed to furnish it. The guaranty in question before us is the one executed by the complainant for the first five-year period pursuant to this provision of the contract.

By a further provision it was agreed that a lease should be entered into between the parties to the agreement at the commencement of each five-year period.

Pursuant to this contract Alphonso Creedon executed a lease of the premises to the society for a period of five years, which was on one of the printed forms in common use in Chicago, and contained among other things a covenant that "at termination of this lease, by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and failing so to do, to pay as liquidated damages, for the whole time such possession is withheld, the sum of ten (\$10) dollars per day"; and at the same time the complainant, the Standard Brewery, signed a guaranty of performance, as follows:

tenancy year. The annual rental was fixed for the first two years of said period, and \$1,800.00 per annum for the remainder of years \* \* \* except as hereinafter otherwise provided. Further the contract provides that the rental value of the premises herein described shall be estimated at the close of each and every five-year period during the entire term of this agreement, said estimate to be made by a Board, one member to be named by each of the parties, who, if unable to agree upon the rental value, should name a third member of the Board, and a majority should determine the rental value. It was also further provided that the society should furnish a surety guaranteeing the payment of the rents to accrue under this agreement for the first five-year period thereof, and if the lessor demanded a surety for the second five-year period the society agreed to furnish it. The guaranty in question before us is the one executed by the complainant for the first five-year period pursuant to this provision of the contract.

By a further provision it was agreed that a lease should be entered into between the parties to the agreement at the commencement of each five-year period.

Pursuant to this contract Alphonse Grignon executed a lease of the premises to the society for a period of five years, which was on one of the printed forms in common use in Ontario, and contained among other things a covenant that "at termination of this lease, by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and failing so to do, to pay an abated damages, for the whole time such possession is withheld, the sum of ten (\$10) dollars per day"; and at the same time the complainant, the Standard Brewery, signed a guaranty of performance, as follows:



"We hereby guarantee the payment of the rent and the performance of the covenants by the party of the second part in the within lease covenanted and agreed, in manner and form as in said lease provided."

It is under this guaranty that it is sought to recover from the complainant the amount of damages imposed under the lease upon the society in the event it did not yield possession at the termination of this lease. The rental for this first five-year period is not in question, as it was paid by the society.

The first five-year period in the lease referred to expired by its terms on July 31, 1908, and the parties began negotiations as to the rental to be paid by the society for the second five-year period under the terms of the twenty-year contract of April 12, 1903. Each party appointed appraisers, who were not able to agree either as to the rental value or upon a third appraiser. The society continued in the possession of the premises.

In November, 1908, Patrick I. Creedon, the defendant herein, became the owner of the premises, and in November, 1909, instituted proceedings in the Municipal Court of Chicago in forcible detainer against the society to recover possession of the premises. The society then filed a bill in chancery in the Circuit Court seeking to have the rental value for the second five-year period fixed by the court, and to enjoin the prosecution of the suit for possession. Both the Creedons were defendants to this bill, and Patrick Creedon filed a cross-bill thereto. The Standard Brewery, complainant in the case at bar, was not a party to that suit. A decree was entered in that case in which the rental value for the second five-year period was fixed; this would be from August, 1908, to July 31, 1913. The society was ordered to pay the Creedons the amount found due, and upon its failure so to do that the contract would be canceled. The society failed to comply with



"The society guaranteed the payment of the rent and the performance of the covenants by the society and the second party in the lease agreement and the society is bound and liable in said lease agreement."

It is under this guaranty that it is sought to recover from the complainant the amount of damages incurred under the lease upon the society in the event it did not yield possession at the termination of this lease. The rental for the first five-year period is not in question, as it was paid by the society.

The first five-year period in the lease referred to expired by its terms on July 31, 1928, and the parties began negotiations as to the rental to be paid by the society for the second five-year period under the terms of the twenty-year contract of April 12, 1921. Such negotiations were fruitless, and were not able to agree either as to the rental value or how a third contract. The society continued in the possession of the premises.

In November, 1928, certain questions were determined, namely, because the owner of the premises, and in November, 1929, instituted proceedings in the Municipal Court of Chicago to forcibly determine against the society to recover possession of the premises. The society then filed a bill in summary in the Circuit Court seeking to have the rental value for the second five-year period fixed by the court, and to require the possession of the said premises. Both the summary and the bill were dismissed to take bill, and the Circuit Court filed a decree at that time, was not a party to that suit. A decree was entered in that case in which the rental value for the second five-year period was fixed; this would be for the years 1929 to July 31, 1934. The society was ordered to pay the balance of the rental found due, and when the balance so due that the contract would be cancelled. The society failed to comply with

this decree, and on October 26, 1915, a further decree was entered canceling the contract and giving the possession of the premises to Creedon.

Thereafter the defendant, Patrick I. Creedon, brought suit in the Municipal Court against the complainant to recover the sum of \$10 per day from the first day of August, 1903, to the 31st day of July, 1908, which was the second five-year period above referred to, under the above mentioned covenant of the lease and the guaranty. Thereupon the complainant filed the bill of complaint in the case at bar.

By the decree before us the chancellor found that the society remained in possession of the premises after the first five-year period and after the termination of the lease therefor, by virtue of the twenty-year contract of April 12, 1903, and not under the lease; that the rental under the lease having been paid in full, all obligations under the guaranty had ceased.

The determination of this question depends upon whether or not at the expiration of the first five-year period the possession of the society should be construed as a trespass for which it was liable in damages, or whether it should be considered as a holdover under the twenty-year contract. We are of the opinion that the chancellor was right in holding that the possession was referable to the contract and not to the lease. The contract itself provides for twenty years possession at a fixed minimum rental; there was no controversy at the end of the first five-year period as to the right of the society to remain; the dispute arose as to the amount of excess rental for the second five-year period over the minimum rate provided by the contract.

A further consideration is that Alphonso L. Creedon took a bond as security for the rents from one Fritz Nebel,

this decree, and on October 24, 1912, a further decree was  
issued concerning the contract and giving the possession of  
the premises to Sweden.

Thereafter the said contract, bearing date of Sweden,  
bearing date in the Municipal Court against the company  
to recover the sum of 100 dollars from the first day of  
August, 1903, to the last day of July, 1904, which was the  
second five-year period above referred to, under the above  
mentioned government of the lease and the company. The company  
the said company filed the bill of complaint in the case of her.  
by the court before the Chancellor found that  
the society remained in possession of the premises after the  
first five-year period and after the expiration of the lease  
thereof, by virtue of the twenty-year contract of April 15,  
1903, and not under the lease; that the rental under the lease  
being then paid in full, all obligations under the company  
has ceased.

The determination of this question depends upon  
whether or not at the expiration of the first five-year period  
the possession of the society should be continued as a tenant  
for which it was liable in Sweden, or whether it should be  
considered as a landlord under the twenty-year contract. We  
are of the opinion that the company has the right to hold  
that the possession was retained in the contract and not to  
the lease. The contract itself provides for twenty years  
possession at a fixed minimum rental; there was no provision  
at the end of the first five-year period as to the right of  
the society to remain; the dispute arose as to the extent of  
extent rental for the second five-year period over the minimum  
rent provided by the contract.

A further consideration is that although in Sweden  
look a good deal of necessity for the same from one trial to the next.



which was taken over by the defendant as security for the rents for the second five-year period. This was a bond given to secure the payment of rents under the contract or under any lease that might be given pursuant thereto. Under such circumstances it cannot be reasonably claimed that the society did not owe rents for the second five-year period as a tenant but did owe damages as a trespasser.

It also should be noted that not only did defendant accept this bond but brought suit thereon for the amount of rents for the very period for which he claims the complainant is liable. His suit was against the society as principal and against Nebel as surety. On account of an error in the language of the bond, which referred to the contract by a mistaken date, he filed a bill in chancery in which he alleged that he was entitled to recover from the society, his tenant, and from the surety on the bond, for the rents during this second period, it being alleged that the bond was given to secure rents for the second five-year period.

In the decree in the Circuit Court case the rental value of the premises for the second five-year period was fixed. There was no claim made by the defendant in that suit for any damages from the society by reason of its remaining in possession after the termination of the first lease. The court also found that there was a liability on the part of the society to pay the rental for the full second five-year period and decreed that the amount of rent should be paid by the society. Not only was there a recovery had for rents, but it also appears by the decree that \$4,000 was paid in installments and turned over to the defendant on account of rents. This, having been accepted on account of rents, cannot now be deemed as payment of liquidated damages. Part of this was collected by the defendant directly from the society,



which was taken over by the defendant as security for the  
 rent for the second five-year period. This was a bond  
 given to secure the payment of rent under the contract  
 or under any lease that might be given pursuant thereto.  
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 he filed a bill in chancery in which he alleged that he was  
 entitled to recover from the society, his tenant, and from  
 the society on the bond, for the rent during this second period,  
 it being alleged that the bond was given to secure rent for the  
 second five-year period.

In the order in the Circuit Court case the rental  
 value of the premises for the second five-year period was  
 fixed. There was no claim made by the defendant in that suit  
 for any deduction from the society by reason of its remaining  
 in possession after the termination of the first lease. The  
 court also found that there was a liability on the part of  
 the society to pay the rental for the full second five-year  
 period and decreed that the amount of rent should be paid by  
 the society. But only one tenant recovery had for rent,  
 but it also decreed by the decree that the society was  
 liable for the amount of rent for the second five-year period  
 and decreed that the amount of rent should be paid by  
 the society. Now, having been decreed on account of rent, cannot  
 now be deemed as payment of liquidated damages. Part of this  
 was collected by the defendant directly from the society.

then in possession, as payment of rent, so that the defendant recognized the society as a tenant after the first five-year period, has collected some of the rent and has a judgment for the balance.

Many other considerations might be noted, but the above are sufficient to lead to the conclusion that the society was not a trespasser in continuing in possession of the premises, but was in law and fact a tenant. Among the cases supporting this view are Eichorn v. Peterson, 16 Ill. App. 601; Dunne v. Trustees, 39 Ill. 578; Madlung v. Jackson, 172 Ill. App. 60; Weber v. Powers, 213 Ill. 370; Kenwood Hotel Co. v. Hiland, 153 Ill. App. 108; Esperit v. Carmichael Range Co., 152 Ill. App. 185; Standard v. Kuhn, 132 Ill. App. 466; Goldsborough v. Cable, 140 Ill. 269, and Kelso v. Grilly, 85 Ill. App. 568. This last case is directly in point. See, also, Taylor's Landlord & Tenant, sec. 22, where the author says with reference to the conduct of a landlord after the termination of a lease: "Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to \* \* make the occupant his tenant"; and this is quoted with approval in Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151.

This view of the case makes it unnecessary to decide whether or not the contract of April 12, 1903, should be considered a lease or a contract for a series of leases. Whatever elements necessary to a lease may be lacking in this instrument do not readily occur to us; in any event it was the instrument under which the society remained in possession, and which, coupled with the conduct of the parties, fixes the character of the possession of the society.

In view of the appearance, answer and cross-bill of the defendant in the chancery proceeding and the allegations therein made, we are not persuaded that there is merit in



the claim of counsel for the defendant that there was no issue made by the pleadings.

The court was called upon to determine the character of the occupancy of the premises after the expiration of the lease, and whether or not there was any liability of the complainant to the defendant. Upon the entire record we are of the opinion that the decree was properly deducible from the evidence before the chancellor, and it is affirmed.

AFFIRMED.



the claim of counsel for the defendant that there was no  
issue made by the plaintiff.

The court was called upon to determine the  
character of the agency of the plaintiff after the ex-  
piration of the lease, and whether or not there was any  
liability of the complainant to the defendant. Upon the  
whole record we are of the opinion that the decree was  
properly sustainable from the evidence before the commission  
and it is affirmed.

AFFIRMED.

THOMAS TAGNEY, for use of  
FLORENCE BRISCOE,

Appellee,

vs.

JAMES A. TABOR,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 440

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for rent by confession on a lease executed by defendant, who thereupon moved the court to have the judgment opened and for leave to defend. This motion was denied, and defendant appeals.

The affidavit filed in support of the motion alleged the misconduct of another tenant in the building in which was the apartment leased by the defendant. This cannot be considered as a constructive eviction by the landlord, and cases cited where the conduct of the landlord was held to amount to an eviction are not in point. It cannot be said that the landlord in the present instance created a nuisance upon the premises; in fact, as appears from the affidavit, when the matter was called to his attention he promised to see what he could do to remedy conditions. However, the improper conduct of another tenant recited in the affidavit cannot be charged to the landlord.

There is no merit in the claim as to difference of date in the statement of claim and of the lease.

The motion was directed to the discretion of the court, and we cannot say that this has been abused. The order and judgment of the trial court are affirmed.

AFFIRMED.

APPEAL FROM JUDICIAL COURT  
OF CALIFORNIA

204 I.A. 440

THOMAS TATNEY, for use of  
MORRIS WILSON,  
Appellee,  
vs.  
JAMES A. TATON,  
Appellant.

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for rent by confession on a lease executed by defendant, who thereupon moved the court to have the judgment opened and for leave to defend. This motion was denied, and defendant appeals.

The affidavit filed in support of the motion alleged the misconduct of another tenant in the building in which was the apartment leased by the defendant. This cannot be considered as a constructive eviction by the landlord, and cases cited where the conduct of the landlord was held to amount to an eviction are not in point. It cannot be said that the landlord in the present instance created a nuisance upon the premises; in fact, as appears from the affidavit, when the matter was called to his attention he promised to see that he could do to remedy conditions. However, the improper conduct of another tenant resulted in the affidavit cannot be charged to the landlord.

There is no merit in the claim as to difference of date in the statement of claim and of the lease. The motion was directed to the dissolution of the court, and we cannot say that this has been shown. The order and judgment of the trial court are affirmed.

SAMUEL HECHT,  
Appellee,

vs.

HARRY J. GOLDBERG and JACOB  
STEIN, trading as Goldberg  
& Stein,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 441

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for wages under a contract of employment with the defendants; upon trial by the court he had judgment for \$105. Defendants seek a reversal.

From the evidence the court could properly find that in June, 1915, plaintiff took employment with the defendants as a designer of women's garments at a salary of \$30 a week; that he was promised an increase as soon as orders commenced to come in on the designs made by him; that he worked for defendants about three months when he received an offer of another job at higher wages, with steady work; that he reported this to defendants, who thereupon promised to pay him \$35 a week, and also that he would be kept until after New Year's. This was in September; he remained with defendants under these promises until October 23rd, when he was discharged by them, just at the time when all his designs for the season had been finished. He was told to come back in case he could not find other employment. He was without employment for six or seven weeks after being discharged.

There is no merit in the contention of defendants' counsel concerning the pleadings. It has been many times held that precision and exactness of statement are not required in 4th class cases. Hopkins v. Levandowski,



APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 E. 441

Appellant,  
HARRY J. GOLDBERG and JACOB  
STEIN, trading as Goldberg  
& Stein,  
Appellees.

MR. PRESIDING JUSTICE ROSS  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for wages under a contract of employment with the defendants; upon trial by the court he had judgment for \$105. Defendants seek a reversal. From the evidence the court could properly find that in June, 1915, plaintiff took employment with the defendants as a designer of women's garments at a salary of \$30 a week; that he was promised an increase as soon as orders commenced to come in on the designs made by him; that he worked for defendants about three months when he received an offer of another job at higher wages, with steady work; that he reported this to defendants, who thereupon promised to pay him \$35 a week, and also that he would be kept until after New Year's. This was in September; he continued with defendants until these promises were broken. Then, when he was discharged by them, just at the time when all his designs for the season had been finished. He was told to come back in case he could not find other employment. He was without employment for six or seven weeks after being discharged.

There is no merit in the contention of defendants that no contract concerning the pleading. It has been many times held that precision and exactness of statement are not required in class cases. Hopkins v. Northwestern,

250 Ill. 372; Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66.

Counsel for plaintiff makes some suggestion that the amount of the judgment was erroneously fixed at \$105 instead of \$210. The judgment is in the amount stated in plaintiff's affidavit supporting his statement of claim. We do not find in the record any motion to increase the ad damnum.

Under the evidence and the law the judgment should not be disturbed, and it is affirmed.

**AFFIRMED.**

200 Ill. 37; London & Co. v. Adams Express Co., 200 Ill.

22.

General for plaintiff's case was

that the amount of the judgment was erroneously fixed at  
\$100 instead of \$210. The judgment is in the amount stated  
in plaintiff's affidavit supporting his statement of claim.  
We do not find in the record any notion to increase the

ad damnum.

Under the evidence and the law the judgment

should not be disturbed, and it is affirmed.

ATTEST.

CARRIE TINTEL, MARY A. KAUTH,  
MINNIE B. EISNER, ANNA TINTEL,  
EMMA A. TINTEL and BIRDIE TINTEL,  
Appellees,

vs.

A. W. GORKE,

Appellant.

APPEAL FROM COUNTY COURT,  
COOK COUNTY.

204 I.A. 442

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiffs had judgment against the defendant for \$244.65 from which defendant appeals.

It is an action brought by the heirs and next of kin of C. H. Tintel, deceased, to recover money due from defendant for goods sold and delivered by C. H. Tintel during his lifetime. The declaration alleged that before the commencement of the suit Tintel had died; that a complete administration was had of his estate in the state of Wisconsin, where he had resided at the time of his death; that all debts of deceased and claims allowed against his estate and all expenses of administration, were fully paid by the administratrix, Minnie B. Tintel, now Minnie B. Eisner, one of the plaintiffs, and that the balance of said estate was distributed among the plaintiffs; that said indebtedness sued on was part of the assets of said estate so distributed and turned over to the plaintiffs, as the only heirs at law and next of kin of said deceased, and that said estate was thereupon closed and said administratrix discharged before the commencement of the suit. To this declaration defendant filed a demurrer which was overruled by the court, and the defendant, electing to stand by his demurrer, appeals.

Counsel agree that the only question submitted



CAROLINE TINTIN, MARY A. TINTIN,  
JENNIE B. TINTIN, ANNE TINTIN,  
MRS. A. TINTIN, and MRS. TINTIN,  
Appellants,

vs.

A. V. TINTIN,  
Appellee.

COOK COUNTY.

ALLIANCE TRUST COMPANY

3041 A. 12

IN THE JUDICIAL DISTRICT COURT OF THE STATE OF ILLINOIS,  
IN AND FOR THE COUNTY OF COOK.

Plaintiffs had judgment against the defendant

for \$24.00 from which defendant appeals.

It is an action brought by the heirs and next

of kin of C. A. Tintin, deceased, to recover money due from

defendant for goods sold and delivered by C. A. Tintin dur-

ing his lifetime. The declaration alleged that before the

commencement of the suit Tintin had died; that a complete

administration was had of his estate in the state of ill-

inois, where he had resided at the time of his death; that

all debts of deceased and claims allowed against his estate

and all expenses of administration, were fully paid by the

administrator, Jennie B. Tintin, now known as B. Tintin, one

of the plaintiffs, and that the balance of said estate was

distributed among the plaintiffs; that said indebtedness was

on one part of the assets of said estate so distributed and

turned over to the plaintiffs, as the only heirs at law and

next of kin of said deceased, and that said assets were there-

upon closed and said administrator accounted before the com-

missioners of the said. To this declaration defendant filed a

denial which was overruled by the court, and the defendant,

petitioned to remove the case to the circuit court.

Complaint being that the only cause of action

for decision is whether the heirs at law and next of kin of the deceased can, after complete administration, maintain an action for the recovery of a claim upon contract, due to the deceased in his lifetime for goods sold and delivered, where such claim was turned over to the heirs at law and next of kin as part of their distributive share in said estate. Defendant bases his contention that this cannot be done upon the decision in McLean County Coal Co. v. Long, 91 Ill. 617. We are of the opinion, however, that this case is not in point. In the case cited John Long in his lifetime sued the coal company to recover for a quantity of coal it had mined and removed from land belonging to him; he recovered a judgment which was subsequently reversed and the cause remanded. Before the case was redocketed in the court below Long died, having by will devised all his property to Honora Long. Neither she nor any other person ever became executor or administrator of Long's estate, no steps being taken in the Probate Court for that purpose. The case was redocketed, the death of Long suggested, and leave given to amend the declaration, which was done by making Honora Long plaintiff, and the case progressed in her name. The Supreme Court decided that the plaintiff had no right without obtaining letters in the estate to maintain the action.

Jacques v. Ballard, 111 Ill. App. 567, is the case of an executrix bringing suit individually upon a note payable to the order of her testator, which had not been endorsed by him and was not before the settlement of the estate endorsed by the executrix. It was held that under our statute the note should have been endorsed by the plaintiff, as executrix, and that without this she could not individually acquire legal title to it.

for decision is whether the heirs at law and next of kin of the deceased can, after complete administration, maintain an action for the recovery of a claim upon contract, due to the deceased in his lifetime for goods sold and delivered, where such claim was turned over to the heirs at law and next of kin as part of their distributive share in said estate. Defendant bases his contention that this cannot be done upon the decision in Holman County Coal Co. v. Long, 91 Ill. 617. We are of the opinion, however, that this case is not in point. In the case cited John Long in his lifetime sued the coal company to recover for a quantity of coal it had mined and removed from land belonging to him; he recovered a judgment which was subsequently reversed and the cause remanded. Before the case was reheard in the court below Long died, having by will devised all his property to Honora Long. Neither she nor any other person ever became executor or administrator of Long's estate, no steps being taken in the Probate Court for that purpose. The case was reheard, the death of Long suggested, and leave given to amend the declaration, which was done by making Honora Long plaintiff, and the case progressed in her name. The Supreme Court decided that the plaintiff had no right without obtaining letters in the estate to maintain the action. Jacques v. Ballard, 111 Ill. App. 567, is the case of an executrix bringing suit individually upon a note payable to the order of her testator, which had not been endorsed by him and was not before the settlement of the estate entered by the executrix. It was held that under our statute the note should have been endorsed by the plaintiff, as executrix, and that without this she could not individually acquire legal title to it.



In Leamon v. McCubbin, 82 Ill. 263, the court held that under our statute the personal estate, after payment of debts, is to descend to and be distributed among the heirs, but that this distribution must be effected through due administration in the proper court.

We can see no reason why plaintiffs may not maintain their action in the cause before us. We have here a complete administration, all the debts and claims paid, a distribution of the assets and a discharge of the administratrix. The account sued on has been completely administered, and the legal title thereto has been properly transferred to plaintiffs by order of distribution. Having become properly vested with the legal title, we can see no reason why they should not be considered as the proper parties to bring an action in the cause. Cases in other jurisdictions supporting this view are Wooten v. Steele, 98 Ala. 252; Suit v. Crawford, 100 Ky. 355; Humphreys v. Keith, 11 Kas. 108, and Pratt v. Pratt, 22 Minn. 148.

The judgment is affirmed.

AFFIRMED.



In Lowery v. McGowan, 32 Ill. 233, the court said that under our statute the personal estate, after payment of debts, is to be divided so and be distributed among the heirs, but that this distribution must be effected through the administration in the proper court.

We can see no reason why plaintiffs may not maintain their action in the court before us. We have here a complete administration, all the debts and claims paid, a distribution of the assets and a discharge of the estate. The account sued on has been completely administered, and the legal title thereto has been properly transferred to plaintiffs by order of distribution. Having done so, we can see no reason why they should not be considered as the proper parties to bring an action in the case. Cases in which this doctrine regarding this view are Wooten v. Steele, 38 Ill. 428; Walt v. Brewster, 100 Ill. 303; Womach v. Weller, 11 Ill. 178, and First v. First, 32 Ill. 148. The judgment is affirmed.

ATTORNEY.

WILLIAM C. NIBLACK, as Receiver  
of the LaSalle Street Trust and  
Savings Bank,

Appellee,

vs.

ABRAHAM L. FELDMAN, MORRIS FELD-  
MAN, NATHAN FELDMAN, partners,  
trading as Feldman Bros., and  
ABRAHAM FELDMAN and LOUIS FELD-  
MAN, individually,

Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

204 I.A. 443

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff's suit was begun in the Municipal Court against Abraham L. Feldman, Morris Feldman and Nathan Feldman, partners, trading as Feldman Bros., and Abraham L. Feldman and Louis Feldman, individually, on a promissory note for \$4,000, dated March 5, 1914, executed by the firm of Feldman Bros. and payable 120 days after date to the order of the LaSalle Street Trust and Savings Bank (referred to hereinafter as the bank), with interest at 7% after maturity until paid. Abraham L. Feldman and Morris Feldman in writing on the back of the note guaranteed the payment of "the within note." Judgment was had against the defendants Abraham L. Feldman and Morris Feldman in the sum of \$4,463.42.

Following the execution and delivery of this note, and on May 15, 1914, the bank borrowed the sum of \$100,000 from the International Trust Company of Boston (hereinafter referred to as the trust company), to secure the payment of which sum it gave its promissory collateral note dated May 15, 1914, payable 60 days after date, and it also at the same time delivered to the trust company as collateral security for the payment of its said note, notes of

ALLIANCE FOR THE  
COURT OF CHICAGO

WILLIAM B. HILLOCK, as Receiver  
of the LaSalle Street Trust and  
Savings Bank,

Appellee,

vs.

ABRAHAM I. FELDMAN, MORRIS FELDMAN,  
NATHAN FELDMAN, partners,  
trading as Feldman Bros., and  
ABRAHAM FELDMAN and LOUIS FELDMAN,  
individually,

Appellants.

204 I.A. 148

MR. JUSTICE HAYES DELIVERED THE OPINION OF THE COURT.

The plaintiff's suit was begun in the Municipal Court  
against Abraham I. Feldman, Morris Feldman and Nathan Feld-  
man, partners, trading as Feldman Bros., and Abraham I.  
Feldman and Louis Feldman, individually, on a promissory  
note for \$4,000, dated March 5, 1914, executed by the firm  
of Feldman Bros. and payable 120 days after date to the or-  
der of the LaSalle Street Trust and Savings Bank (referred to  
hereinafter as the bank), with interest at 7% after maturity  
until paid. Abraham I. Feldman and Morris Feldman in writing  
on the back of the note warranted the payment of "the within  
note." Judgment was had against the defendants Abraham I.  
Feldman and Morris Feldman in the sum of \$4,463.42.

Following the execution and delivery of this

note, and on May 15, 1914, the bank borrowed the sum of  
\$100,000 from the International Trust Company of Boston  
(hereinafter referred to as the trust company), to secure  
the payment of which sum it gave its promissory collateral  
note dated May 15, 1914, payable 90 days after date, and it  
also at the same time delivered to the trust company as col-  
lateral security for the payment of its said note, notes of



the face value of \$147,000, included among which was the \$4,000 note above referred to.

On June 18, 1914, on a petition by the People of the State of Illinois, William C. Niblack was appointed by the Circuit Court of Cook County receiver for the bank, and on the same day, by order of court, the bank was dissolved and the receiver was directed to proceed to convert into money all of its property and assets.

On July 14, 1914, the Circuit Court, on the petition of the receiver, entered an order of record, a copy of which order is as follows:

"That said receiver, out of the funds in his hands as such receiver, be authorized to purchase from said International Trust Company of Boston the said promissory note for One Hundred Thousand (\$100,000) Dollars mentioned in said petition, and also said other indebtedness amounting to about Eight Thousand (\$8,000) Dollars, and secure possession of said collateral notes and bonds mentioned therein, if, in his judgment, in case he should make such purchase, he will be able to realize from said collateral notes and bonds a sum more than sufficient to pay the amount due said International Trust Company of Boston from said LaSalle Street Trust and Savings Bank, and for which it holds said collateral notes and bonds as securities.

"That said receiver, in case he makes such purchase and secures possession of said collateral notes and bonds, collect or otherwise convert the same into money, so far as the same may be collectible, and out of the proceeds thereof first restore to the general funds in his hands as such receiver the amount of such funds used to make such purchase from said International Trust Company of Boston and hold the balance of said proceeds as a separate fund subject to the further order of this court, and that all questions of set-offs in favor of the makers of said collateral notes and all other claims in respect to said collateral notes, and each of them, be reserved for the further consideration and determination of this court."

Following the entry of this order the receiver paid the sum of \$108,000 to the trust company and he secured possession of the said note of the bank for \$100,000 and all of the notes and securities which had been delivered to the trust company as collateral security for the payment of this



the face value of \$100,000, included among which was the \$5,000 note above referred to.

On June 18, 1914, on a petition by the trustee of the State of Illinois, William C. Hinch was appointed as the Illinois court of said county receiver for the bank, and on the same day, by order of court, the bank was dissolved and the receiver was directed to proceed to convert into money all of its property and assets.

On July 14, 1914, the circuit court, on the petition of the receiver, entered an order of record, a copy of which order is as follows:

"That said receiver, out of the funds in his hands as such receiver, be authorized to purchase from said International Trust Company of Boston the said promissory note for one hundred thousand (\$100,000) dollars mentioned in said petition, and also said other indebtedness amounting to about thirty thousand (\$30,000) dollars, and secure possession of said collateral notes and bonds mentioned therein, it, in his judgment, in case he should care such securities, he will be able to realize from said collateral notes and bonds a sum more than sufficient to pay the amount due said International Trust Company of Boston from said bank and collect said notes and bonds as securities.

"That said receiver, in case he should care such securities and secure possession of said collateral notes and bonds, collect or otherwise convert the same into money, so far as the same may be collectible, and out of the proceeds thereof first restore to the general funds in his hands as such receiver the amount of money used to make such purchase from said International Trust Company of Boston and hold the balance of said proceeds as a separate fund subject to the further order of this court, and pay off any claims or debts in favor of the receiver of said collateral notes and bonds, and of the claims of said collateral notes, and any of claims in favor of said collateral notes, and any of them, as reserved for the further consideration and determination of this court."

Following the entry of said order the receiver paid the sum of \$100,000 to the trust company and he received possession of the said note of the bank for \$100,000 and all of the cash and securities which had been deposited to the credit of the bank as collateral security for the payment of the

note.

The firm of Feldman Bros. had on deposit in the bank at the time plaintiff was appointed receiver the sum of \$2,377.31. On August 6, 1914, defendants tendered the receiver in cash the sum of \$1,646.02, being the difference between the amount Feldman Bros. had on deposit in the bank at that time and the amount due on the said note of \$4,000. The receiver refused to accept the sum tendered and refused to surrender the note.

The language of the order of July 14, 1914, is that the receiver "be authorized to purchase from said International Trust Company of Boston the said note for \$100,000 \* \* and secure possession of said collateral notes and bonds." The receiver was authorized to purchase the bank's note of \$100,000 and to secure possession of the note payment of which was guaranteed by the defendants. The question, then, to be determined by this court is, was the transaction in the course of which the receiver obtained possession of the <sup>\$4000</sup>note in question under order of court, a redemption of that note from the lien of the trust company, or did the receiver secure such note as the result of a purchase by him so that it may be said, in the interest of the general creditors of the bank, that the receiver is an endorsee for value and before maturity of such note?

In his petition for the entry of the order of July 14, 1914, the receiver, referring to the pledged notes in the possession of the trust company, among which was the said note of the defendants, stated:

"If said promissory notes and bonds were in the possession of your petitioner the makers of certain of said notes would be entitled to set-off against same the balances which they respectively had on deposit in said LaSalle Street Trust and Savings Bank at the time of the appointment of your petitioner as receiver thereof, to wit: \* \* \*

note.

The first of defendant's notes had on deposit in the bank at the time plaintiff was appointed receiver the sum of \$1,377.31. On August 6, 1914, defendant tendered the receiver in cash the sum of \$1,440.00, being the difference between the amount defendant had on deposit in the bank at that time and the amount due on the said note of \$1,400. The receiver refused to accept the sum tendered and refused to surrender the note.

The language of the order of July 14, 1914, is that the receiver "be authorized to purchase from said International Trust Company of Boston the said note for \$100,000 \* \* and secure possession of said collateral notes and bonds." The receiver was authorized to purchase the bank's note of \$100,000 and to secure possession of the note payment of which was guaranteed by the defendants. The question, then, to be determined by this court is, was the transaction in the course of which the receiver obtained possession of the note in question under order of court, a redemption of that note from the lien of the trust company, or did the receiver secure that note as the result of a purchase by him so that it was his, in the interest of the general creditors of the bank, that the receiver is authorized to value and before receipt of such notes.

In his petition for the entry of the order of July 14, 1914, the receiver, referring to the pledged notes in the possession of the trust company, among which was the said note of the defendants, stated:

"If said pledged notes and bonds were in the possession of your petitioner the debts of certain of said notes would be entitled to set-off against some of the assets which your petitioner had on deposit in said bank. I have been advised that the sum of the said notes is the same as the sum of the assets which your petitioner has received from the trust company."



"Said Feldman Brothers would be entitled to set off a deposit of \$2,377.31 against their note of \$4,000, leaving a balance due your petitioner as receiver as aforesaid of \$1,622.69. \* \* \*

"If said promissory notes and bonds were all in the possession of your petitioner and the same were all collectible, your petitioner would realize therefrom, after allowing all of said set-offs, the sum of \$113,208.30."

It is evident that at the time this petition was filed the receiver believed that the defendants would have the legal right to set off the amount of the deposit in the bank against the sum due on the note. No suggestion is made in the petition that the receiver desired or intended to purchase the note of the bank in the hands of the trust company; the defendants were not made parties to the proceedings in the Circuit Court which culminated in the entry of the order in question, and it is difficult to understand how that court, without the actual or constructive presence of defendants in court, could by its order so alter the legal relations of the defendants and the bank, or the receiver, as to so materially affect the liability of the defendants.

The receiver is not solely the representative of either the creditors or the stockholders of the insolvent bank; his position is that of a stakeholder, and he is in possession of the property of the insolvent as an officer of the court; his control of the affairs of the insolvent and his possession of its property is not for the sole benefit of any special class of claimants or creditors, but may be said to be in the interest of and for the benefit of any and every person who may have a legal interest in an honest and efficient control and distribution of its assets.

In Young v. Stevenson, 180 Ill., on page 614, the court, referring to the powers of a receiver, said:



"And when the receiver would be entitled to pay off a deposit of \$2,500.00, the receiver is to pay the same to the depositor as receiver as shown on the receipt of \$2,500.00."

"If said receiver would be entitled to pay off the deposit of \$2,500.00, the receiver is to pay the same to the depositor as receiver as shown on the receipt of \$2,500.00."

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against the sum due on the note. No suggestion is made in the

petition that the receiver desired or intended to purchase the

note of the bank in the hands of the first company; the defend-

ants were not made parties to the proceedings in the Circuit

Court which culminated in the entry of the order in question,

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advice or constructive notice of defendants in court, could

by its order to allow the legal relations of the defendants and

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administration of the assets.

In re Receiver of the Bank of the City of New York

Case No. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"They are, therefore, such, only, as are conferred by courts of equity, under their equitable jurisdiction, upon receivers appointed by such courts. As receiver he represents the corporate body and not the shareholders."

In *High on Receivers*, 4th Ed., sec. 134, p. 153, the author says:

"The general proposition is well established that, the receiver being the officer or agent of the court from which he derives his appointment, his possession is exclusively the possession of the court, the property being regarded as in the custody of the law, in gremio legis, for the benefit of whoever may be ultimately determined to be entitled thereto."

It was not only the right but also it was the duty of the receiver to redeem the notes deposited as collateral for the payment of the bank's note; if the facts were as alleged in the receiver's petition he would have added materially to the bank's assets by the payment of its note and the redemption of the notes given as collateral security. In the presence of this duty, as asserted by the receiver himself, it would be most inequitable to permit him by a mere form of words used in the order of the court, to change the essential nature of the transaction between himself and the trust company. There is nothing in this record that indicates that the Circuit Court intended by the entry of the order to determine any such question as is presented here; no such issue is raised by the receiver's petition, and we are inclined to the view that the direction to purchase was inserted in the order by inadvertence. Notwithstanding the language of the order, we are inclined to the view that the transaction was in substance a redemption and not a purchase of the note in question, as insisted upon by the plaintiff. The trust company became the pledgee of the note sued on; its possession, under its agreement with the bank, did not vest

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receiver himself, it would be most inequitable to permit him

by a mere form of words used in the order of the court, to

change the essential nature of the transaction between him-

self and the trust company. There is nothing in this record

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form was inserted in the order by inadvertence. We

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the view that the transaction was in substance a redemption and

not a purchase of the note in question, as intimated upon by the

plaintiff. The trust company became the pledgee of the note and

on its possession, under its agreement with the bank, did not rest



it with complete title in or ownership of the note; this right of possession would, upon the happening of an uncertain event, authorize it in accordance with its agreement with the bank, to sell or dispose of the note, but until the happening of such event its title was special in its nature. Union Trust Co. v. Rigdon, 93 Ill. 467.

We do not agree with the contention of plaintiff that the receiver was an endorsee of the note of defendants for value, merely because he procured the note from the trust company under the order of the court. Legally his possession was that of the corporation whose property it was when pledged, and his rights and obligations with reference thereto must be held to be the same as those of the bank; his right to redeem the note was acquired in the same manner as his right to the possession of the other property and assets of the bank; it became his duty as receiver to assert its, the bank's, right to redeem the note in question, as it was his duty to meet and pay the obligations of the bank so far as permitted by the assets in his hands.

The law does not impose upon receivers the obligation of defeating the just, legal claims of special or lien creditors in the interest of general creditors of the insolvent. It is true, no doubt, that the receiver in the instant case, in the exercise of sound business judgment, thought it advisable to acquire possession of the defendants' note in question in the interest of the general creditors of the bank; and even if it be conceded, as claimed by the plaintiff, that the evidence discloses that the general funds in the hands of the receiver at the time of the trial have not been repaid the amount taken therefrom to make such redemption, this fact in and of itself cannot



it will complete this is an essential of the law; this  
right of possession being, upon the suggestion of an interest  
with the bank, to sell or dispose of the note, and transfer  
the possession of such note to the bank, and in its  
name. Union Trust Co. v. Bank, 23 Ill. 457.

It is not necessary with the bank to transfer  
till that the receiver was an holder of the note of re-  
ference for value, and it is not necessary that the note from  
the bank company under the order of the bank, and that  
his possession was that of the corporation whose property  
it was when placed, and his rights and obligations with  
reference thereto, but he held to be the same as those of  
the bank; his right to redeem the note was recognized in the  
same manner as his right to the possession of the note  
himself and assets of the bank; it became his duty as  
receiver to accept it, and the bank's right to redeem the  
note in question, as it was his duty to accept and pay the  
obligations of the bank as far as permitted by the statute  
in this regard.

The law does not impose upon receivers the ob-  
ligation of retaining the trust, legal claims of special or  
lien creditors in the interest of general creditors of the  
debtor. It is true, no doubt, that the receiver in the  
instant case, in the exercise of sound business judgment,  
should have retained the possession of the de-  
btor's note in question in the interest of the general  
creditors of the bank; and even if it be considered, as  
claimed by the plaintiff, that the receiver's duties there  
the general funds in the hands of the receiver at the time  
of the trial have not been repaid the amount taken therefrom  
to make such redemption, this fact in and of itself cannot

change the inherent character of the transaction or the legal relations of the parties.

If it be the law that the receiver's possession of the property and assets of the insolvent is for the benefit of every person having an interest in a proper administration of his trust, it is difficult to find a reason why, as a consequence of his appointment as receiver, such appointment should vest in him a power which could not have been exercised by the insolvent corporation had no receiver been appointed. Clearly in the absence of such appointment or of the <sup>bank's</sup> insolvency, the bank would not be permitted by law to deny a legal right of set-off by calling an actual redemption of collateral notes deposited by it with a creditor, a purchase, and we can see no sufficient reason why under substantially similar conditions such privilege should be accorded a receiver.

Under the terms of the collateral note the bank had the right to redeem the notes deposited with the trust company as security for the loan; the trust company, on default of the bank, could have sold such notes, and in that event it would have been its duty to credit the amount received therefor as a payment on the note of the bank; the right of the bank was to redeem, and the right of the trust company was to sell on default of the bank. The receiver, on his appointment as such, stood in the place of the bank; he sought to avoid a compliance with the terms of the collateral note by procuring the entry of an order of court which authorized him to purchase the note in question. We are of the opinion that on the facts disclosed by this record this transaction should be held to be a redemption and not a purchase of the note.

change the inherent character of the transaction in the hands of the receiver of the notes.

If it be the law that the receiver's possession of the property and assets of the insolvent is for the benefit of every person having an interest in a proper administration of his trust, it is difficult to find a reason why, as a consequence of his appointment as receiver, such appointment should vest in him a power which could not have been exercised by the insolvent corporation had no receiver been appointed. Clearly in the absence of such appointment or of the insolvency, the bank would not be permitted by law to deny a legal right of set-off by calling an actual redemption of collateral notes deposited by it with a creditor, a process, and we can see no sufficient reason why under substantially similar conditions when privilege should be accorded a receiver.

Under the terms of the collateral note the bank had the right to redeem the notes deposited with the trust company as security for the loan; the trust company, on the fault of the bank, could have sold such notes, and in that event it would have been its duty to credit the amount received therefor as a payment on the note of the bank; the right of the bank was to redeem, not the right of the trust company was to sell on behalf of the bank. The receiver, on his appointment as such, stood in the place of the bank; he sought to evade compliance with the terms of the collateral note by securing the entry of an order of court which authorized him to purchase the note in question. He was of the opinion that on the facts disclosed by this record this transaction should be held to be a redemption and not a purchase of the note.



We are inclined to agree with the contention of counsel that defendants would have had no right of set-off as against the trust company; that company of course in the event of default in payment of the collateral note could have set up that it was a pledgee of the note and that it had taken it before maturity, without notice of any right of set-off existing in the maker or endorser as against the pledgor. The issue here is not as to the rights of the trust company resulting from the pledge of the note in question, and, as has been stated, the receiver, with relation to the matter in dispute, stands in the place of the bank rather than that of the trust company, and as we view the facts of the case the receiver cannot be regarded as being in any sense or at any time a pledgee of the note.

It is further contended by plaintiff that even if it be conceded that the transaction by which the receiver took the \$100,000 note and collateral therefor from the trust company be held to be a redemption of such collateral, nevertheless the defendants are not permitted to set off the amount of the deposit in the bank against any sum that may be due upon the note.

It may be quite true, as asserted by counsel for plaintiff, that under certain conditions the receiver might have entered into contracts and relations for the purpose of procuring money to redeem the notes in question, under such circumstances as would defeat or postpone the defendants' right of set-off. Under the facts of the instant case, however, we are inclined to think that defendants' right of set-off has not been defeated by the circumstances under which the receiver obtained possession of the note.

It is also asserted that the defendant Abraham L. Feldman, being an endorser and guarantor of the note in ques-



We are limited to what the corporation  
of record has determined and we have no right to set-  
off or against the trust company; that company of course  
in the event of default in payment of the corporation note  
could have set up that it was a holder of the note and  
that it had taken it before maturity, without notice of  
any kind of set-off existing in the books or accounts of  
the trust company. The latter note is not in the books  
of the trust company according to the books of the note  
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being in any sense at any time a holder of the note.  
It is further contended by counsel that even  
if it be conceded that the assignment by which the receiver  
took the \$100,000 note and collateral mortgage from the trust  
company be held to be a redemption of such collateral, never-  
theless the assignments are not perfected in set off the amount  
of the deposit in the bank against any due that may be due  
when the note.  
It may be said that, as matters of record  
for present, that under certain conditions the receiver  
might have entered into contracts and relations for the pur-  
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under such circumstances as would have been within the re-  
ceiver's right of set-off. Under the facts of the instant  
case, however, we are inclined to think that the receiver's  
right of set-off has not been defeated by the circumstances  
under which the receiver obtained possession of the note.  
It is also asserted that the receiver's defense is unavailing,  
being in substance and substance of the note is unavailing.

tion, cannot set off against his liability as such endorser the deposit of the firm of Feldman Bros. in the bank. Suit was dismissed in the Municipal Court as to all of the defendants except Abraham L. Feldman and Morris Feldman, both of whom were members of the firm of Feldman Bros.; the defendants individually became, at least secondarily, liable by their endorsement of this note for its payment. It is insisted that this copartnership deposit cannot be set off in the suit of the receiver against the defendants Abraham L. Feldman and Morris Feldman, individually, as guaranters of the note. We do not agree with this contention. Under the Negotiable Instruments Act, chapter 98 of the Revised Statutes of Illinois, endorsers of negotiable instruments are declared to be secondarily liable upon such instruments. One who endorses in blank a promissory note becomes, in legal effect, a surety for its payment when due. In Marcy v. Whallon, 115 Ill. App. 435, it was held that a surety may interpose by way of defense to an action against him a demand due from the plaintiff to the principal defendant. "While it is a general rule that in order that a set-off may be applied there must be mutual and connected demands between the same parties and in the same right, yet suits against principal and surety furnish an exception to the rule." In Himrod v. Baugh, 85 Ill. 435, it was held in a suit against a principal and his sureties, that the sureties, as defendants, could plead by way of set-off a demand due from the plaintiff to the principal defendant. Feldman Bros., the makers of the note in question, would have been permitted, by way of defense to an action on the note, to avail themselves of any legal de-

that, cannot act off against his liability as such negotiant  
 the deposit of the time of delivery. In the bank. But  
 was admitted in the judgment that as to all of the de-  
 posits except Abraham L. Feltman and Morris Feltman, both  
 of whom were members of the firm of Feltman Bros.; the de-  
 posits individually become, at least nominally, liable  
 by their agreement of this note for its payment. It is  
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 the suit of the receiver against the defendant Abraham L.  
 Feltman and Morris Feltman, individually, as partners of  
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 are declared to be severally liable upon such instruments.  
 One who indorses a promissory note becomes, in  
 legal effect, a surety for the payment when due. In Harvey  
v. Walker, 115 Ill. App. 435, it was held that a surety  
 may interpose by way of defense to an action against him  
 a demand due from the plaintiff to the principal defendant.  
 "While it is a general rule that in order that a  
 set-off may be applied there must be mutual and connected  
 demands between the same parties and in the same right,  
 yet equity against principal and surety furnish an  
 exception to the rule." In Harvey v. Walker, 115  
 Ill. App. 435, it was held in a suit against a principal and his  
 sureties, that the sureties, as defendants, could plead by  
 way of set-off a demand due from the plaintiff to the principal  
 defendant. Feltman Bros., the makers of the note in  
 question, would have been protected, by way of set-off to  
 an action on the note, to avail themselves of any legal de-



fenses to the action, - such, for instance, as whole or partial payment of the note, - and they would likewise have been permitted, had the action been brought by the bank, to have urged any valid set-off that they might have to their liability on the note. We are aware of no rule of law which holds a guarantor, an endorser or a surety of a negotiable instrument to a higher liability upon a negotiable instrument than is imposed upon the principal maker of such instrument.

The defendants, by the use of express language, guaranteed the payment of "the within note." Whether the obligation assumed by them be regarded under the Negotiable Instruments Act as a primary or secondary liability, it is obvious that their agreement was to pay the debt of another, and we can see no reason why, under the authority of the cases last above cited, they should not be permitted to set off the debt due their principal by the bank, against the receiver's action on the note.

The judgment of the Municipal Court is reversed and judgment is entered in this court in favor of the plaintiff in the sum of \$1646.02 with costs against plaintiff here and below.

REVERSED AND JUDGMENT HERE.



reference to the action, - and, for instance, as to the fact-  
 that payment of the note, - and that such payment have  
 been received, and the action being brought by the bank, to  
 have the note voided on the ground that it was not a valid  
 receipt of the note, - and the bank of no value to the  
 action as a receipt, in either of a receipt of a re-  
 ceivable instrument to a receipt liability upon a negotiable  
 instrument then is imposed upon the principal bank of such  
 instrument.

The defendant, by the use of various language,  
 guaranteed the payment of "the within note." Whether the  
 obligation assumed by them be regarded under the negotiable  
 instrument act as a primary or secondary liability, it is  
 obvious that such instrument was to pay the bank of London,  
 and so can be no other way, under the receipt of the  
 cases just above cited, they should not be permitted to set  
 off the debt due their principal by the bank, against the  
 receiver's action on the note.

The judgment of the Circuit Court is reversed  
 and judgment is entered in its favor in favor of the  
 plaintiff in the sum of \$1846.02 with costs against plaintiff

here and below.

REVEREND AND HONORABLE JUDGE.

WILLIAM C. NIBLACK, as Receiver of  
the LaSalle Street Trust and  
Savings Bank,

Appellee,

vs.

GOLSEN-DOAN COAL COMPANY,  
Appellant.

APPEAL FROM MUNICIPAL  
OF CHICAGO.

204 I.A. 445

MR. PRESIDING JUSTICE McSURNLY

DELIVERED THE OPINION OF THE COURT.

Plaintiff, in suit against defendant on its promissory note, upon an instructed verdict had judgment for \$2,256.67, from which defendant appeals.

The note of the defendant given to the La Salle Street Trust and Savings Bank is one of the group of notes delivered by this bank to the International Trust Company of Boston, and returned by the trust company to the receiver, under the circumstances set out in detail in the opinion by Mr. Justice Dever in Niblack, Receiver, v. Feldman et al., No. 22658, this day filed. What is said in that opinion as to the facts is applicable also to this case, and the conclusions of law therein expressed control our decision herein.

Our conclusion that the transfer of the notes by the International Trust Company to the receiver was not a sale but was a redemption by the receiver, disposes of all the points presented in the instant case. Defendant was entitled to set off its deposit against the claim of the plaintiff, and its motion to so instruct the jury should have been allowed.

By the pleading the amount of defendant's deposit was admitted to be \$2,383.22; setting this off

WILLIAM C. KIRKMAN, as Receiver of  
the Louisville Street Street and  
Improvement Board,

Appellee,

vs.

ROBERT-DAN COAL COMPANY,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF LOUISIANA.

204 I.A. 142

THE LOUISIANA JUDICIAL DEPARTMENT  
BEFORE THE CLERK OF THE COURT.

That, in said appeal, the appellant, the  
Robert-Dan Coal Company, upon an assigned writ of  
certiorari, for \$2,500.00, from which defendant appeals.

The facts of the defendant's appeal are as follows:

That Robert-Dan Coal Company is one of the largest

coal producers in the State of Louisiana.

That Robert-Dan Coal Company is one of the largest

coal producers in the State of Louisiana.

That in the appeal, the appellant, the Robert-Dan Coal Company, is one of the largest

coal producers in the State of Louisiana.

That in the appeal, the appellant, the Robert-Dan Coal Company, is one of the largest

coal producers in the State of Louisiana.

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coal producers in the State of Louisiana.

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coal producers in the State of Louisiana.

against the amount of plaintiff's judgment leaves a balance due defendant of \$126.45. The judgment of the Municipal Court is reversed, and judgment will be entered in this court for the defendant on its set-off, and against the plaintiff, for \$126.45, to be paid in due course of administration.

REVERSED AND JUDGMENT HERE.



against the amount of liability's liability for a balance  
 the defendant of \$100.00. The defendant of the Municipal  
 Court is reversed, and judgment will be entered in this  
 Court for the defendant on its motion, and against the  
 plaintiff, for \$100.00, to be paid in the form of ad-  
 vancement.

REVEREND AND TO CLERGY, BROTHER.

346 - 22780

JOE RUDZINSKI,  
Appellee,

vs.

GROVER C. ELMORE,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 446

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment entered against him for \$270, in a suit brought by the plaintiff to recover moneys paid by plaintiff to defendant.

The evidence is in more or less confusion. Plaintiff did not understand English, and the interpreter upon the trial seems to have had difficulty in eliciting a clear story. We think, however, that from the testimony of all the witnesses the trial court could properly find that the defendant, who was a dealer in real estate, entered into negotiations looking to the sale of a lot to plaintiff. The understanding, which was partly by parol and evidenced by receipts, was that when plaintiff should be able to pay \$500 on account of the purchase price, a written contract was to be entered into<sup>for</sup> the sale of the lot. Plaintiff made two payments, one of \$100 and the other of \$170, for which he received receipts from defendant. These receipts are indefinite in terms, and amount to no more than evidence of the payment of money in pursuance of an understanding between the parties as stated. Subsequently, when plaintiff had accumulated the balance of the earnest money, a contract was drawn up and submitted to plaintiff. There then arose some disagreement as to the lot which was to be the subject

JOE RUBINSTEIN,  
Appellee,  
vs.  
GROVER C. RIMON,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF CHICAGO.

304 I.A. 448

MR. PRESIDING JUSTICE McDERMOTT  
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment entered against him for \$270, in a suit brought by the plaintiff to recover moneys paid by plaintiff to defendant.

The evidence is in more or less confusion. Plaintiff did not understand English, and the interpreter upon the trial seems to have had difficulty in eliciting a clear story. We think, however, that from the testimony of all the witnesses the trial court could properly find that the defendant, who was a dealer in real estate, entered into negotiations looking to the sale of a lot to plaintiff. The understanding, which was partly by parol and evidenced by receipts, was that when plaintiff should be able to pay \$500 on account of the purchase price, a written contract was to be entered into for the sale of the lot. Plaintiff made two payments, one of \$100 and the other of \$170, for which he received receipts from defendant. These receipts are indefinite in terms, and amount to no more than evidence of the payment of money in pursuance of an understanding between the parties as stated. Subsequently, when plaintiff had accumulated the balance of the earnest money, a contract was drawn up and submitted to plaintiff. There then arose some disagreement as to the lot which was to be the subject

of the contract. Plaintiff claimed that he submitted the contract to someone in a bank who informed him, in substance, that it was not the contract which he had contemplated making. As near as we can ascertain from the record, the defendant, before plaintiff was ready with the whole amount of his earnest money, had sold the lot plaintiff had intended to buy, and plaintiff was not willing to take another piece of property which defendant offered him.

Whatever may be the facts as to the misunderstanding about the property, we think it is manifest that there never was any contract between the parties. Defendant's counsel argues as if there was a parol contract for the purchase of real estate; this is not supported by the evidence. At most, there was a verbal understanding that as soon as plaintiff should be able to pay \$500 on account of the purchase price a contract would be entered into. There was no agreement that the payments which plaintiff might make on account of the earnest money, and before a contract was entered into, should be retained by the defendant. The whole matter was conditioned upon plaintiff's ability to gather together \$500, and if he should be unable to do this, there is no legal reason why defendant should retain any moneys paid over to him on account.

Either upon the ground that there was no contract between the parties, or that defendant refused to enter into a written contract for the particular property concerning which the parties had negotiated, the judgment of the trial court is right and is affirmed.

AFFIRMED.



of the contract. Plaintiff claimed that he submitted the contract to someone in a bank who informed him, in substance, that it was not the contract which he had contemplated making. As far as we can ascertain from the record, the defendant, before plaintiff was ready with the whole amount of his earnest money, had sold the lot plaintiff had intended to buy, and plaintiff was not willing to take another piece of property which defendant offered him.

Whatever may be the facts as to the misrepresentation about the property, we think it is manifest that there never was any contract between the parties. Defendant's counsel argues as if there was a parcel contract for the purchase of real estate; this is not supported by the evidence. At most, there was a verbal understanding that as soon as plaintiff should be able to pay \$500 on account of the purchase price a contract would be entered into.

There was no agreement that the payments which plaintiff might make on account of the earnest money, and before a contract was entered into, should be retained by the defendant. The whole matter was conditioned upon plaintiff's ability to gather together \$500, and if he should be unable to do this, there is no legal reason why defendant should retain any moneys paid over to him on account.

Either upon the ground that there was no contract between the parties, or that defendant refused to enter into a written contract for the purchase of property concerning which the parties had negotiated, the judgment of the trial court is right and is affirmed.

SAMUEL KERSTEN,  
Appellee,

vs.

WEST COAST ROOFING AND  
MANUFACTURING CO., a corp.,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 447

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for labor and materials furnished to the defendant; upon trial by the court he had judgment for \$867.03.

The controversy centers around a boiler which plaintiff, by a written proposal, undertook to install in the factory building belonging to defendant, defendant claiming that it was not in compliance with plaintiff's undertaking. By his contract in writing, plaintiff undertook to furnish "one 20 horse power submerged tube vertical high pressure steam boiler for working pressure of 100 lbs. per square inch, size of boiler to be 42x87 and to pass all City requirements for working pressure of 100 lbs." That such a boiler was installed is not disputed, but defendant claims that it was defective.

We hold that the court could properly find that the defense of defects in the boiler or workmanship was not proven. It was demonstrated that the difficulty which arose in the use of the boiler by defendant was because of the fact that this size boiler was inadequate for the requirements of defendant. Many witnesses testified who were experienced in boilers, and none of them undertakes to point out any defects in the construction or mechanical work or material of the

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

SAMUEL ROBERTS,  
Plaintiff,  
vs.  
WEST COAST HOISTING AND  
HAULAGE CO., a corp.,  
Appellant.

2041 A. 447

THE HONORABLE JUSTICE ROBERTS  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for labor and materials furnished to the defendant; upon trial by the court he had judgment for \$867.03.

The controversy centers around a boiler which plaintiff, by a written proposal, undertook to install in the factory building belonging to defendant, defendant claiming that it was not in compliance with plaintiff's undertaking. By his contract in writing, plaintiff undertook to furnish "one 20 horse power submerged tube vertical high pressure steam boiler for working pressure of 100 lbs. per square inch, size of boiler to be 42x87 and to pass all City requirements for working pressure of 100 lbs." That was a boiler as installed is not disputed, but defendant claims that it was defective.

We hold that the court could properly find that the defect of defects in the boiler or workmanship was not proven. It was demonstrated that the difficulty which arose in the use of the boiler by defendant was because of the fact that this size boiler was inadequate for the requirements of defendant. Many witnesses testified who were experienced in boilers, and none of them undertakes to point out any defects in the construction or mechanical work or material of the



boiler. It also appears that the defendant at one time had employed an architect who had drawn specifications for the defendant, and it is a fair inference that these specifications were followed in the proposal and contract under which the work was done; in fact, it is in evidence that the specifications under which plaintiff worked were drawn by the superintendent of construction employed by the defendant. There was no guaranty by the plaintiff that this kind of boiler would do the work, and nothing in the entire contract which could be so construed. The trial court could rightly conclude that the defendant relied upon its own judgment, formed under advices of experienced men in its employ, as to the style and size of the boiler required; it therefore can not be heard to say that there was any fraud on the part of the plaintiff.

Counsel for defendant have cited many cases as to implied warranties and duress, and have endeavored to show misrepresentation by the plaintiff. The facts being as we have above indicated, none of these citations is in point, and misrepresentations on the part of the plaintiff were not proven.

The decisions applicable to this case are those in which it has been held that where a contract calls for the delivery of a certain, specified kind of article, there is no implied warranty of its fitness for any purpose, other than that it be the kind specified. In Peoria Grape Sugar Co. v. Turney, 175 Ill. 631, the court quotes with approval from the English "Sale of Goods act" as follows:

"In the case of a contract for the sale of a specified article under its patent or other trade name there is no implied contract as to its fitness for any particular purpose,' for the reason, as stated in the authorities, that 'an undertaking as to fitness is not implied where the buyer gets what he bargained for.'"



bolter. It also appears that the defendant at one time had employed an architect who had drawn specifications for the defendant, and it is a fair inference that these specifications were followed in the proposal and contract under which the work was done; in fact, it is in evidence that the specifications under which plaintiff worked were drawn by the defendant of construction employed by the defendant. There was no dispute by the plaintiff that this kind of bolter would do the work, and nothing in the entire contract which could be so construed. The trial court could rightly conclude that the defendant relied upon its own judgment, as to the manner and style of the bolter required; it therefore cannot be held to say that there was any fraud on the part of the plaintiff.

Counsel for defendant have cited many cases in which similar circumstances and facts, and have endeavored to show misrepresentation by the plaintiff. The facts being as we have above indicated, none of these citations in any way, and misrepresentations on the part of the plaintiff were not proven.

The defendant is liable to this case are those in which it has been held that where a contract calls for the delivery of a certain, specified article of article, there is no implied warranty of its fitness for any purpose, unless then that it is so specified. In Boyle v. Boyle, 173 Ill. 401, the court quotes with approval from the English "case of Boyle v. Boyle" as follows:

"In the case of a contract for the sale of a specified article under its patent or other trade name there is no implied warranty as to its fitness for any particular purpose," for the reason, as stated in the authorities, that "an understanding as to fitness is not implied where the buyer knows that he purchased for."

And in Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88, 97,  
the court said:

"Where a known, described and definite article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. In a contract for the sale of an article under its patent or other trade name there is an undertaking that the article delivered shall be of the kind ordered but not that it shall be fit for any particular purpose. If the buyer gets what he bargained for, there is no implied warranty though it does not answer his purpose."

This is in accord with the decisions in a very large number of cases/

Under the facts of this case no other proper conclusion was possible, and the errors, if any, upon the trial in rulings on evidence or upon propositions tendered are not sufficient to warrant a reversal. The judgment is affirmed.

AFFIRMED.

And in Yates v. Jones, 100 U.S. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the court said:

"There is a known, described and definite article in the contract, and it is stated to be delivered by the purchaser for a particular purpose, still, if the law, described and definite article is actually delivered, there is no warranty that it shall answer the particular purpose intended by the buyer. In a contract for the sale of an article under its patent or other name there is an understanding that the article delivered shall be of the kind ordered and not that it shall be fit for any particular purpose. If the buyer sets out the article for, there is no implied warranty that it does not answer his purpose."

This is in accord with the decisions in a very large number

of cases.

Under the facts of this case no other proper conclusion was possible, and the court, it may be said, is relying on evidence or upon propositions founded are not sufficient to warrant a reversal. The judgment is

affirmed.

ATTORNEYS.

TIMOTHY O'BRIEN and  
NELLIE O'BRIEN,  
Appellees,

vs.

MICHAEL E. QUIRK,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

204 I.A. 448

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover moneys paid by them to the defendant on a certain contract for the sale of real estate, which it was averred defendant refused to perform, and also for money loaned to the defendant. Upon trial by the court plaintiffs had judgment for \$941.

There is no dispute as to the amount of money paid, nor as to the obligation of defendant to return it because of his failure to perform the contract, and even if this were questioned by defendant's counsel the court properly could so conclude.

The point which defendant attempts to make in this court is, as stated, that the judgment "is not supported by the finding of the court" and is therefore erroneous. This point is based upon some informal talk by the trial court indicating that the court thought "that Mr. O'Brien, the plaintiff, ought to have his money back." This is not the formal finding of the court. The record reads, "The court finds the issues against the defendant and assesses the plaintiffs' damages at the sum of," etc. The order of judgment reads, "That the plaintiffs have judgment on the finding herein and that the plaintiffs have and recover of and from the defendant



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

TIMOTHY D. BROWN and  
ROBERT C. BROWN,  
Defendants,  
vs.  
RICHARD E. BROWN,  
Plaintiff.

305-22780

RECEIVED THE OFFICE OF THE CLERK  
U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Plaintiff's motion to set aside the judgment and to recover money paid by him to the defendant on a certain contract for the sale of real estate, which it was asserted defendant refused to perform, and also for money loaned to the defendant. Upon trial of the case plaintiff's motion was denied for want of equity. There is no dispute as to the amount of money paid, nor as to the obligation of defendant to return it because of his failure to perform the contract, and even if this were disputed by defendant's counsel the court properly could so conclude.

The point which defendant's counsel made in this case is, as stated, that the judgment "is not supported by the findings of the court" and he asserts erroneously. This point is based upon some informal talk by the trial court indicating that the court thought "that Mr. Brown, the plaintiff, ought to have his money back." This is not the formal finding of the court. The record reads, "The court finds the defendant liable for the sum of \$10,000.00 and interest thereon, and costs of the suit." The order of judgment reads, "That the plaintiff have judgment on the finding herein and that the plaintiff have and receive it and from the defendant

the damages of the plaintiffs." The judgment and finding are consistent, and there is no merit in defendant's point.

The law is so well established as to require no citations, that in a contract of this sort, where the seller of real estate refuses to make a deed or comply with his undertaking, the buyer is entitled to recover whatever moneys he may have paid.

There is no reason to reverse the judgment, and it is affirmed.

AFFIRMED.

the damages of the plaintiff. The damages and finding are consistent, and there is no error in defendant's verdict. The law is so well established as to require no discussion, and in a contract of this sort, where the seller of real estate refuses to make a deed or comply with the undertaking, the buyer is entitled to recover whatever money he may have paid.

There is no reason to reverse the judgment.

and it is affirmed.

APPEAL.

12719

MARGARET HOULIHAN, as Adminis-  
tratrix of the Estate of  
FRANK A. HOULIHAN, deceased,  
Appellee,

vs.

SULZBERGER & SONS COMPANY,  
Appellant.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

204 I.A. 449

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court against Sulzberger & Sons Company for the sum of \$6,500 and in favor of Margaret Houlihan, as administratrix of the estate of Frank A. Houlihan, deceased.

It was charged in the declaration filed in the case that plaintiff's intestate came to his death by and through the negligence of the defendant. Plaintiff's intestate at the time he met his death was an employe of the Hamler Boiler & Tank Works (hereinafter referred to as the Hamler Company). The defendant had entered into a contract with the Hamler Company, under the terms of which the latter company was employed to adjust and tighten a certain iron band around a smokestack upon the premises of defendant. The smokestack was held in place by means of guy wires attached to the iron band about the stack, the other ends of which wires were attached by bolts to buildings on the premises. The contract under which deceased's employer agreed to do this work was to be performed on the hour basis, the charge provided in the contract being 90 cents to \$1.00 an hour for "each man on the job."

The defendant had maintained on and in one of the buildings in question, to which one of the guy wires



MAINTAIN COURTSHIP, as against  
PROPERTY OF THE ESTATE OF  
THOMAS A. HOULIHAN, deceased,  
Applicant.

vs.

HOULIHAN & SON COMPANY,  
Respondent.

APPEAL FROM DECISION  
OF THE COURT OF COMMON PLEAS,  
COLUMBIA, PENNSYLVANIA.

201 A. 440

MR. JUSTICE BRADY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Or-

phans Court against Houligan & Son Company for the sum  
of \$5,000 and in favor of Margaret Houligan, as administratrix  
of the estate of Thomas A. Houligan, deceased.

It was charged in the declaration filed in the

case that plaintiff's intestate came to his death by and

through the negligence of the defendant. Plaintiff's in-

terest at the time he met his death was an interest of the

Greater Diller & Lark Store (hereinafter referred to as the

Greater Company). The defendant had entered into a contract

with the Greater Company, under the terms of which the de-

fendant was employed as agent and clerk of a certain

store and among a stockbook upon the premises of defendant

was. The stockbook was said to have been found by

himself at the time he was about the store, the store

was of which store were retained by said defendant

on the premises. The defendant under said contract's em-

ployer agreed to pay him the sum to be paid on the

first day, the charge provided in the contract being 50

cents per hour for each day on the lot.

The defendant was employed on and to one of

the buildings in question, to which one of the key was

referred to had been fastened, two permanent ways by means of which access might be had to the roof of the building. One of these ways was an inside stairway leading from the ground to the 5th floor of the building. There is some dispute in the evidence as to what means was provided for access to the roof from this 5th floor. Certain witnesses testified that a ladder was provided for such use, by use of which it was possible to reach the roof of the building from the 5th floor through an opening in the roof. The other means maintained by defendant for approach to the roof of the building was a ladder, described by some of the witnesses as a "fire ladder," attached to the exterior of the building. This ladder extended from the ground to a roof over a loading platform; this roof was about level with the second floor of the building, and another ladder extended perpendicularly from this roof to the top of the building.

Immediately before the time of the accident in question plaintiff's intestate was ascending the upper one of the two last mentioned ladders. He carried in his hands a line which was attached to the loose end of a guy wire that lay on the ground. He was assisted in this work by a man named Buckley, and the two men were about to raise the guy wire to which the line was attached, for the purpose of attaching it to an eye-bolt near the top of the building, when certain rungs in the ladder upon which deceased was working gave way, and he was precipitated to the ground and he sustained injuries as the result of which he died.

It is insisted on behalf of the defendant that deceased, while on the ladder, was a trespasser, or, at most, a bare licensee, and that defendant owed him no duty except not to wilfully injure him, and in support of this contention it is argued that under its contract with the

refused to be taken forward, the defendant was of course at which point he was taken to the top of the building. One of these ways was by means of a ladder leading from the ground to the top floor of the building. There is some dispute as to the evidence as to what means was provided for access to the roof from this first floor, certain witnesses testified that a ladder was provided for such use, by one of which it was possible to reach the roof of the building from the first floor without any opening in the roof. The other means

maintained by defendant for access to the roof of the building was a ladder, described by some of the witnesses as a "fire ladder," attached to the exterior of the building. This ladder extended from the ground to a point over the building; when used was about level with the second floor of the building, and another ladder extended between the building and the roof of the building.

Immediately before the time of the accident in question defendant's interest was centered in the upper end of the two first mentioned ladders. He carried in his hands a line which was attached to the lower end of a guy wire that ran on the ground. He was standing in this wire by a man named Smith, and the two men were about to raise the guy wire to which the line was attached. For the purpose of raising it to an eye-bolt near the top of the building, when certain points in the ladder upon which defendant was standing were, and he was positioned to the ground and he was raised upward as the result of which he died.

It is pointed out by the defendant that defendant, while on the ladder, was a trespasser, or, at least, a mere licensee, and that defendant owed him no duty except not to interfere with him, and in support of this contention it is argued that under the contract with the



Hamler Company the defendant owed Houlihan no duty to furnish him with means of access to the roof.

The contract referred to provided for the performance of some repair work by the deceased's employer for the defendant, the work to be performed being the tightening of a loose band upon the smokestack in question. The contract did not provide for the construction of any permanent building or ways upon the premises of defendant; it did not include the furnishing of materials for any purpose; and it was essentially an agreement for the doing of relatively unimportant repair work upon the premises. Possession of no part of the premises was given over to the Hamler Company for the performance of this work; nor was it necessary to do so for proper execution of the work that it was employed to perform. During the course of this work all parts of the premises remained in the possession of and under the control of the defendant. Having in mind the contract in question and what it provided, it was, we think, the duty of the defendant company to use reasonable care to furnish deceased with a safe means of access to the roof of the building.

It is also urged that the defendant had the right to assume that Houlihan, the deceased, would use such ordinary, regular and safe means as were present on the premises, for the performance of the work in which he was engaged, and not an unusual and hazardous means; and it is asserted that Houlihan for his own convenience put the ladder in question to a use for which it was not designed.

There is evidence in the record to the effect that this ladder was used and provided as a fire ladder, although certain witnesses, including the foremen and other employees of defendant, testified that the ladder was used by





them for other than fire protection purposes. One McLaughlin, foreman for defendant, testified that he did have occasion to go to the roof of the building, and that in doing so "we went up both ways; sometimes up the ladder, sometimes up the steps; sometimes I would go up the inside and come down the outside, and then we went up the outside and come down in the inside. \* \* I think I went up there a couple of times a week, clear from the bottom. \* \* I have seen men go up there."

There was evidence heard on the trial which tended to show that the deceased was on the premises of the defendant by its implied invitation; that he used a means or way for approach to the roof of the building in question which was convenient for the use he had put it to; and that the ladder, from which he fell, had been used freely by the employes of the defendant in and about their work.

It is also urged by counsel that the defendant was not guilty of any negligence in the maintenance of the ladder, and that even if it be conceded that the ladder was in a defective condition at the time of the accident, there is no evidence in the record from which the jury were authorized to determine that the defendant had actual or constructive knowledge of such defective condition.

The evidence tends to disclose that two rungs of the upper ladder gave way under deceased. He had been immediately preceded up the ladder by a co-employee, who testified that immediately after the accident he noticed the two rungs on the roof of the canopy, and that they were rotten on the ends; that the ends were rotten "a half an inch or so"; and that he could crumble and twist off part of the ends with his fingers. The rungs of the ladder were kept in place by being mortised into the outer

then for other than the protection purposes. The witness  
 did, however, for defendant, testified that he did have an  
 occasion to go to the roof of the building, and that in doing  
 so he went up both ways; sometimes up the ladder, sometimes  
 up the stairs; sometimes I would go up the inside and come  
 down the outside, and then he went on the outside and come  
 down the inside. \* \* I think I went up there a couple of  
 times a week, first from the bottom. \* \* I have been seen  
 as he came."

There was evidence heard on the trial which  
 tended to show that the defendant was on the premises of the  
 defendant by the alleged invitation; that he used a means  
 or way far removed from the roof of the building in question  
 which was convenient for the use he had put it to; and that  
 the ladder, from which he fell, had been used freely by  
 the employees of the defendant in the usual manner.

It is also urged by counsel that the defendant  
 was not guilty of any negligence in the selection of the  
 ladder, and that even if it be conceded that the ladder was  
 in a defective condition at the time of the accident, there  
 is no evidence in the record from which the jury were en-  
 titled to determine that the defendant had actual or con-  
 structive knowledge of such defective condition.

The evidence tends to indicate that the  
 of the upper ladder gave way under pressure. It was found  
 immediately attached up the ladder by a co-employee, who  
 testified that immediately after the accident he noticed  
 the two men on the roof of the building, and that they  
 were looking on the edge; that the men were looking in half  
 an inch or so; and that he could not see them any more  
 went at the same time with his fingers. The weight of the ladder  
 was about 100 pounds, and it was broken into two pieces.



edge of the uprights, and to the outer face of these uprights perpendicular strips were nailed which kept the rungs in their place in the ladder. When deceased, in ascending the ladder, had reached nearly to the top of the building he was seen to fall over backwards from the ladder. Two of the rungs, the second and third from the top, had given way and had fallen down with deceased to the roof over the loading platform. After the accident it was seen that the perpendicular strips which had been nailed over the face of the uprights were hanging loose at the point where the two rungs had given way.

It is fairly inferable from the evidence in the record that the accident was caused by the rotten condition of the ends of the two rungs, and by the insecure manner in which the perpendicular strips in question were attached to the uprights into which the rungs were mortised.

It is earnestly insisted on behalf of the defendant that defendant had exercised every reasonable care to make the ladder safe for the purposes for which it was intended to be used. The ladder was erected about seven years before the time of the accident, and certain witnesses for the defendant testified that frequent inspections had been made of it, that it had been painted annually, and that an inspection was made of the ladder about two months before the date of the accident. There can be no doubt on this record that the ladder in question was defective, and that the defects caused the death of plaintiff's intestate. Whether under this evidence the defendant can fairly be charged with actual or constructive notice of these defects was, we believe, a question of fact for the determination of the jury. The rungs which gave way in the ladder were last seen immediately after the deceased had fallen; they were





not produced at the trial; but it does not seem to be seriously disputed that they were rotten. Whether the defective and dangerous condition of the ladder could have been discovered by competent inspection, and whether the ladder had been properly constructed, were, under the evidence in this case, questions of fact for the determination of the jury. There was evidence taken at the trial from which the jury might fairly conclude that the ladder in question was in a dangerous and unsafe condition, and that such condition could have been discovered by the defendant in the exercise of reasonable care for the protection of persons who might properly have occasion to use it. There was some evidence to the effect that with reference to one of the rungs in question it was rotten at both ends, and that at the time of the accident three or more other rungs were found to be loose.

it appeared that

In Newingham v. Blair Co., 232 Pa. 511/ a tinner was injured as the result of a collapse of a fire escape which he was using in his work for his employer, a subcontractor. Deciding the case the court said:

"In the present case the defect was in a fire escape which from its very nature, and by reason of the purpose it was intended to serve should have been kept in a safe condition for use at all times. To be sure the use which the defendant company directed should be made of it by the plaintiff was not the ordinary office of a fire escape, but it was apparently not an improper use, and, at any rate, it was placed at the disposal of the plaintiff and his fellow workmen by the express direction of the officer of the defendant company. In making use of the fire escape, as directed and required, the plaintiff had a right to rely on the presumption that the defendant had performed its duty in providing a reasonably safe means of access to the roof. The fire escape was under the circumstances to all intents and purposes, an outside stairway. If, instead of making use of it, the plaintiff had been instructed to take the inside stairway, and had been injured by the giving way of an improperly constructed platform, it would hardly be contended that the defendant would not be liable for the results. The fact that the fire escape, temporarily transformed at the direction of the defendant into a stairway, was located outside of the building, rather

the product of the trial; but it does not seem to be  
 easily accepted that they were not. However, the defendant  
 and defendant's contention of the intent could have been  
 covered by competent investigation, and without the intent had  
 been properly conducted, with, under the evidence in this  
 case, questions of fact for the consideration of the jury.  
 There was evidence taken at the trial from which the jury  
 might fairly conclude that the intent in question was in  
 a conscious and unselfish manner, and that such conclusion  
 could have been discovered by the defendant in the exercise  
 of reasonable care for the protection of persons and things  
 properly have occasion to use it. There was some evidence  
 to the effect that this reference to one of the things in  
 question it was rather of such order, and that at the time of  
 the accident there or more other things were found to be  
 loose.

it appeared that  
In *Insurance v. Blair*, 101 N.D. 111, 112

was injured as the result of a collapse of a tile  
 which he was using in his work for his employer, a con-  
 tractor. Decision was given the court said:

"In the present case the defendant was in a tile  
 house which was the very nature, and by reason of the  
 purpose it was intended to serve should have been the  
 in a safe condition for use at all times. To be sure the  
 one when the defendant's property suffered damage as a  
 result of the accident was not the defendant's fault or  
 the accident, but it was obviously not an accident, and  
 was, at any rate, it was caused by the defendant's  
 negligence and his failure to exercise the proper care  
 at the time of the accident. In the present case, the  
 tile house, as intended and required, the plain-  
 tiff had a right to rely on the defendant's promise  
 to furnish and maintain the roof in provided a reasonably  
 safe house of refuge for the roof. The tile house was  
 under the circumstances to all intents and purposes, an  
 article of property. It, therefore, of making was at the  
 plaintiff had been instructed to take the house into  
 use, and was injured by the falling of the tile  
 properly maintained, it would surely be con-  
 sidered that the defendant would not be liable for the  
 accident. The fact that the tile house, inasmuch  
 as the defendant of the defendant's fault  
 plaintiff was liable for the accident, and



than inside, cannot change the principle involved. See, also, Reynolds v. Brod. C. Co., 192 Ill. App. 157.

In the cases just cited it appeared that the injured persons used the ways referred to in the cases - which were not in their nature intended for the use they were in fact put to - on the express invitation of the defendants, and in this respect they differ from the case at bar. We are inclined to the view, however, that here there was an implied invitation extended to deceased to use a way which was intended to be and was in fact used generally by persons who, in the course of their employment, were required to go to the roof of the building.

After verdict the court allowed plaintiff to amend the declaration. The original declaration charged that the deceased, while working for his employer, was engaged in and "about the placing and repair of a certain large smokestack." As amended, the declaration charged with more particularity the particular thing in and about the doing of which the deceased was employed. The amendment in substance charged that the deceased was engaged in the fastening of "one end of a guy ~~wire~~ wire to an iron band that encircled and was clamped to" the smokestack; the original declaration made no reference to the band referred to. Under the evidence the jury were fully warranted in concluding that the band which the Hamler Company was employed to remove and repair and then replace around the smokestack, was a part of the smokestack itself. We are also of the opinion that the declaration as amended did not state a new cause of action against the defendant, and that the plea of the statute of limitations did not lie against the charge of negligence made in either the original or amended declaration.



then made, cannot change the original intention. See  
also, Wheeler v. State, 100 Ill. App. 107.

In the cases just cited it appeared that the  
jury verdict was the only one to be given - which  
was not in itself material for the law was not in  
fact put to - as the extreme violation of the defendant,  
and in this respect they differ from the case at bar. In  
the instance at the bar, however, the jury found and the  
applied instruction extended to deceased to use a weapon  
was intended to be used and in fact used for the purpose  
same and, in the course of their deliberation, were required  
to do so the rest of the verdict.

It is further stated that the jury verdict is  
against the defendant. The original intention thereof that  
the deceased, while working for his employer, was engaged in  
and about the taking and receipt of a certain large sum of  
money. As stated, the defendant charged with such  
clearly the jury could find in and about the taking of  
the money was approved. The amount in question  
showed that the deceased was engaged in the taking of  
the sum of a few years ago to an issue that was  
and was charged to the defendant; the original intention  
was made in reference to the same referred to. Under the  
evidence the jury were fully warranted in concluding that  
the defendant, while the latter company was engaged to receive  
and receive the same money through the defendant, was a  
part of the defendant itself. It is also of the opinion  
that the defendant was charged with the same as was shown  
of action against the defendant, and that the jury of the  
evidence of intention did not in regard to the charge of  
destruction was in either the original or revised version.

It is urged as a ground for reversal of the judgment that the court refused to permit defendant to file certain pleas to plaintiff's amended declaration. One of these pleas, in substance, was that deceased and the Hamler Company had elected to be bound by the Workmen's Compensation Act of 1911; that under section 2 of the act the Hamler Company, by reason of the death of deceased, became liable to pay to his surviving widow and children the compensation provided in the act; that the plaintiff, on behalf of such widow and children, had received and was then receiving from the said Hamler Company the compensation so provided. It was admitted at the trial that the compensation paid plaintiff under the act amounted to \$1,287.

In Borgnis v. Falk Co., 133 N. W. (Wis.) 209, it was said by the court, speaking through Chief Justice Winslow:

"that the personal injury action brought by the employe against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies, and must continue to levy, upon the civilized world. \* \* \* To speak of the common law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty."

The theory of most, if not quite all, of the compensation acts of recent years is that the industry in which an injured workman is engaged should bear a just proportion of any loss sustained by reason of injuries received by such workman in the course of his employment, regardless of the manner in which the injury was received. Due to inadequacy of the pre-existing common law and statutory remedies, society had become charged with the support of an immense number of dependent and disabled persons because of injuries





sustained by employes in particular trades or callings; in cases arising before the enactment of compensation laws rigid rules of law compelled an employe plaintiff to stand prepared to show that he was in no way guilty of negligence contributing to the accident which brought about his injury, and he was further hampered by the rules relating to assumption of risk and of the negligence of fellow servants.

Section 3 of the Compensation Act of 1911 provides that -

"No common law or statutory right to recover damages for injury or death sustained by any employe while engaged in the line of his duty as such employe other than the compensation herein provided shall be available to any employe who has accepted the provisions of this act or to any one wholly or partially dependent upon him or legally responsible for his estate."

It is conceded that deceased's death was brought about as the result of injuries sustained by him while engaged in the line of his duty as an employe of the Hamler Company, and that plaintiff has received the compensation above referred to. The question for determination here, then, is whether plaintiff is barred from any further recovery of compensation by reason of the loss resulting from the death of deceased, which death the jury found was occasioned by and through the negligence of the defendant. The compensation which plaintiff in fact received from the Hamler Company cannot be said to be a full compensation for the loss which she sustained by reason of the death of deceased. The theory of the Compensation Act of 1911 is not that of full compensation for losses sustained. In the exercise of a sound public policy the law has, within recent years, charged the industries<sup>in</sup> which workmen are employed with a share of the losses resulting





from injuries to such workmen.

Section 3 of the Compensation Act of 1911 abolishes the common law or statutory right to recover damages for injuries or death sustained by an employe while engaged in the line of his duty as such employe, and it is urged that this precludes the plaintiff in this case from a recovery against the defendant, on the theory that plaintiff's whole right of recovery is limited to the compensation provided by the Compensation Act. We do not regard this contention as sound. When consideration is given to the remedy which the legislature sought to provide by the act, and when regard is had to the conditions which led to the enactment of the law in question, it is obvious that the legislature intended to establish a reform of the pre-existing legal relations between employes and employers. The purpose of the act was to charge the industries with the burden of paying some compensation to all persons, or their dependents, who came within the classes of persons to be benefitted by the act.

Section 17 of the act provides as follows:

"(a) The employee or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation which he is entitled to under this act shall be reduced by the amount of damages recovered.

"(b) If the employee or beneficiary has recovered compensation under this act, the employer by whom the compensation was paid or the person who has been called upon to pay the indemnity under Sections 4 and 5 of this act, may be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employee to recover damages therefor."

Under other provisions of the act the employer is charged with the payment of compensation to beneficiaries, in amounts limited by the act itself. We are inclined to the view that the Compensation Act has abrogated the plaintiff's right to recover under the statutes or the common law





as they existed prior to the enactment of the Compensation Act of 1911, as against deceased's employer only; that her right to an action for damages as against third persons has not been affected, except that insofar as the employer has in fact paid or is legally liable to pay compensation, under the act, to the plaintiff, such employer may be subrogated to the rights of the plaintiff as against the defendant. We do not believe that the legislature intended by limiting the amount which the law compelled the employer in this case to pay, to deprive the plaintiff of her full right of recovery for all damages she has sustained by reason of the wrongful act of defendant.

The Compensation Act was intended to provide compensation for loss sustained in all cases coming within the terms of the act. The theory was to shift responsibility for the support of injured persons and their dependents, in part from society to the industries in which such injured persons were employed, and it is more in consonance with one's sense of justice to believe that the legislature had no thought of depriving a plaintiff of his common law or statutory right of action against a third person wrongdoer by reason of the passage of this act. We do not understand how this construction of the act will lead to a double or treble recovery in certain cases, as insisted upon by counsel for defendant. Where compensation has been received, as in this case, section 17 of the act permits the employer to be subrogated to the rights of the plaintiff as against the defendant. A different construction of the act would, in many cases where injuries had resulted from a wrongful act of a person not an employer, result in an injustice to a person injured, or his dependents, and would further, in cases, amount to a partial release of a





wrongdoer from liability for his wrongful act.

Paragraph "b" of section 17 of the act provides that "if the employee or beneficiary has recovered compensation \* \* the employer by whom the compensation was paid \* \* may be entitled to indemnity \* \* and shall be subrogated to the rights of the employee to recover damages therefor." This language, as we read it, means that the employer is entitled to indemnity, that is, he is entitled to be subrogated to the rights of the employee to the extent that he, the employer, has been required to pay compensation under the act. This, it seems to us, is the only reasonable construction that the language of this paragraph of the act will bear. The right to indemnity is the right that the law gives the employer to be subrogated not to all of the rights of the employee against a third person, but only as to so much of the employee's rights as will furnish indemnity for any loss sustained by the employer because of the provisions of the act.

If our construction of this act be correct, then the plaintiff in this case will not be permitted to receive or retain any compensation as against the Hamler Company in the event that the judgment against the defendant is paid to plaintiff. Directly or indirectly, the Hamler Company is entitled to be subrogated to the rights of plaintiff in and to an amount equal to any sum which it has paid or which it shall become liable to pay to her under the Compensation act of 1911.

It is true, as urged, that it was intended by the enactment of the compensation act that compensation should be provided for every case coming within the terms of the act, and, this being so, we think that compensation





may be paid and a recovery of damages also be had in cases arising under the act; but the act itself does provide means whereby injustice to an employer may be prevented. Our construction of the act is that the plaintiff is entitled to but one complete satisfaction of her claim for damages; and that where that claim for damages arises from a tortious act of a third person, and a part thereof is paid by an employer, the employer may, by properly asserting his right of subrogation under the act, protect himself from any unfairness or injustice.

Our attention has been called to a recent decision of the Supreme Court of the State of Illinois in the case of Emma Keeran, Admx., v. Peoria, B. & C. T. Co., filed in that court February 21, 1917, which dealt with a construction of the Workmen's Compensation Act, as amended in 1913. Section 17 of the act of 1911, referred to here, was definitely modified by section 29 of the act of 1913. Section 29 provides, in substance, that where an injury or death is caused under circumstances creating a legal liability for damages in some person other than an employer, such other person having elected to be bound by the act, the right of the employe or his representative to recover against such other person "shall be subrogated to his employer." It will be noted that this language of section 29 expressly provides for subrogation to the rights of an injured employe or his representative, by an employer who had paid compensation under the act, where "such other person" has "also elected to be bound by this act." Section 17 of the act of 1911 contains no such language, and we think it is inferable from other language in section 29 that the legislature recognized that prior to the enactment of that section, and under the act of 1911, an employe in-



may be held and a recovery of damages also be had in cases arising under the act; and the act itself does provide means whereby injurious to an employer may be prevented. Our construction of the act is that the plaintiff is entitled to but one complete satisfaction of her claim for damages; and that where that claim for damages arises from a tortious act of a third person, and a tort thereof is paid to an employer, the employer may, at properly asserting his right of subrogation under the act, protect himself from any outlay or expenses.

Our attention has been called to a recent de-

cision of the supreme court of the state of Illinois in the case of Wm. Keating, Inc. v. Lewis, E. & L. Co., filed in said court January 21, 1911, which dealt with a construction of the Workmen's Compensation act, as amended in 1910. Section 17 of the act of 1911, referred to here, was definitely modified by section 22 of the act of 1910. Section 29 provides, in substance, that where an injury or death is caused under circumstances creating a legal liability for damages in some person other than an employer, such other person having elected to be bound by the act, the right of the employer or his representative to recover against such third person shall be subrogated to the employer. It will be noted that this language of section 29 expressly provides for subrogation to the extent of an injured employer or his representative, or an employer who had sold compensation under the act, where "such other person" was "also elected to be bound by this act." Section 17 of the act of 1911 containing no such language, and we think it is inferable from other language in section 22 that the legislature re-enacted that prior to the enactment of that section, and under the act of 1911, an employer in-

jured through the wrongful act of a third person would have his right of action against such third person, notwithstanding an award of compensation from his employer for such injury under the act of 1911.

It is complained that other errors were committed by the trial court in refusing defendant leave to file pleas, and in giving and refusing to give certain instructions. We have examined the record and briefs of counsel with reference to these questions, and we do not think that any error was committed by the trial judge with reference thereto that would warrant a reversal of the judgment.

Finding no reversible error in the trial of the case, the judgment of the Superior Court will be affirmed.

AFFIRMED.

turned through the wonderful lot of a single person would have  
his right of action against such third person, notwithstanding  
the an award of compensation from the employer for such  
injury under the act of 1911.

It is contended that error exists when  
mistaken by the trial court in certain instances have to  
file cases, and in giving and refusing to give certain  
instructions. We have examined the record and briefs of  
argument with reference to these questions, and we do not  
think that any error was committed by the trial judge with  
reference thereto that would warrant a reversal of the judg-  
ment.

Nothing to reversible error in the trial of  
the case, the judgment of the superior court will be af-  
firmed.

ATTORNEYS.

221 - 22651

JOHN STEVENS,  
Appellee,

vs.

R. E. MOODY and HAROLD  
B. KLINE (Defendants)

On appeal of HAROLD B.  
KLINE,  
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 451

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court against R. E. Moody and Harold B. Kline, defendants, upon two collateral promissory notes for \$1,500 each, payable six months after date to the order of the Fort Dearborn National Bank of Chicago. The defendant Moody was the maker of the notes, and the defendant Kline, on the back of the notes, guaranteed their payment.

In his affidavit of merits the defendant Kline set up by way of defense that there was no consideration for the notes, in that the sole purpose of their making and endorsement was to substitute them in the place and stead of two notes for the same amount, which, before the execution of the two notes in suit, had been made and endorsed by defendants, and that the substitution for which the notes in suit were executed was not in fact made; that the original notes were outstanding and had been protested for non-payment.

The notes in suit were introduced in evidence by the plaintiff, and in addition to the guaranty of Kline



JOHN B. MOODY, Appellee,

vs.

R. A. MOODY and HAROLD B. KLINE (Defendants)

On appeal of HAROLD B. KLINE, Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

20411-121

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court against R. A. Moody and Harold B. Kline, defendants, upon two collateral promissory notes for \$1,500 each, payable six months after date to the order of the First National Bank of Chicago. The defendant Moody was the maker of the notes, and the defendant Kline, on the back of the notes, guaranteed their payment.

In his affidavit of merits the defendant Kline set up by way of defense that there was no consideration for the notes, in that the sole purpose of their making and endorsement was to substitute them in the place and stead of two notes for the same amount, which, before the execution of the two notes in suit, had been made and endorsed by defendants, and that the substitution for which the notes in suit were executed was not in fact made; that the original notes were outstanding and had been protested for non-payment.

The notes in suit were introduced in evidence by the plaintiff, and in addition to the guaranty of Kline

bore on the back of each the following: "Without recourse .  
Fort Dearborn National Bank, by H. R. Kent, V. P."

The notes were made payable to the Fort Dearborn National Bank, and were by the bank endorsed in blank. We do not think that there is evidence in the record which would warrant this court in finding that plaintiff was not a holder of the notes for value, before maturity and without notice of any legal defense which Kline, who alone has brought the case here by appeal, had to an action on the notes as against the payee named therein; but even if it be assumed that plaintiff had no actual interest in the notes sued upon, he would still have the legal right to bring his action against the defendant.

In Lyman v. Kline, 128 Ill. App. 497, 500, this court, speaking through Mr. Justice Holdom, said: "It is well settled that where a note is endorsed in blank, suit may be brought in the name of any person who does not object, about which a defendant has no concern and cannot be heard to complain."

The only evidence tending to prove that Stevens was not a beneficial owner and holder of the notes in question was that of a witness who testified that Mr. Adams, Stevens' attorney, had said to him, the witness, that Mr. Stevens was the holder of the notes simply for purposes of suit. This testimony was objected to, and the objection overruled. We think the objection should have been sustained. We find no evidence which tends to prove that Adams had any authority to bind the plaintiff by the statement which he is alleged to have made; Stevens' right to the possession of, his interest in and his right to bring an action upon, the notes in question could not be limited by anything that

fore on the back of each the following: "Without recourse.

Fort Dearborn National Bank, N.Y. & N.Y., V. 1."

The notes were made payable to the Fort Dearborn National Bank, and were by the bank endorsed in blank.

do not think that there is evidence in the record which

would warrant this court in finding that plaintiff was not

holder of the notes for value, before maturity and without notice of any legal defense which might have been brought

the case here by appeal, had to an action on the notes as

against the payee named therein; but even if it be assumed

that plaintiff had no actual interest in the notes sued upon,

he would still have the legal right to bring his action

against the defendant.

In Lynn v. Kline, 108 Ill. App. 427, 500, this

court, speaking through Mr. Justice McDevitt, said: "It is

well settled that where a note is endorsed in blank, and

any one presents it in the name of any person who does not object, about which a defendant has no concern and cannot be heard to

complain."

The only evidence tending to prove that Stevens

was not a beneficial owner and holder of the notes in

question was that of a witness who testified that Mr. Adams,

Stevens' attorney, had said to him, the witness, that Mr.

Stevens was the holder of the notes simply for purposes of

suit. This testimony was objected to, and the objection

overruled. We think the objection should have been sustained.

To find no evidence which tends to prove that Adams had any

authority to bind the plaintiff, or the defendant when he

is alleged to have made; Stevens' right to the possession

of, his interest in and his right to bring an action upon,

the notes in question could not be limited by anything that



Adams might have said, so far as this record discloses.

The defendant sought to defend as against his liability on the notes on the ground that there was no consideration for the notes in question, and that there had been a failure of such consideration. Under the circumstances these defenses might have been good as against the original payee, but on this record they cannot be urged as against the plaintiff in this suit. The defendant admits that he endorsed the notes in question at the time they were executed; that the notes were given in payment of two notes which prior to such endorsement had been in the hands of the Fort Dearborn National Bank; that the two earlier notes had become due in the hands of the bank and had been protested for nonpayment by it.

On the evidence presented by defendant there is no reason to believe that he had become or would become liable to make double payment on his endorsements. If suit should be brought by the bank upon the earlier notes, the action of the bank may be defeated by evidence of the judgment in this suit, and in that the record shows that the earlier notes were in the possession of the bank after maturity, there is no possibility that any other person may acquire such title to them as will prevent the defendant, in an action thereon, from pleading payment.

The judgment of the Municipal Court is affirmed.

**AFFIRMED.**



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about might have said, so far as this record discloses.

The defendant sought to defend as against his

liability on the notes on the ground that there was no

consideration for the notes in question, and that there had

been a failure of such consideration. Under the circumstances

these defenses might have been good as against the original

payee, but on this record they cannot be urged as against the

plaintiff in this suit. The defendant admits that he endorsed

the notes in question at the time they were executed; that the

notes were given in payment of two notes which prior to such

endorsement had been in the hands of the Fort Deposit National

Bank; that the two earlier notes had become due in the hands

of the bank and had been protested for nonpayment by it.

On the evidence presented by defendant there is no

reason to believe that he had become or would become liable

to make double payment on his endorsements. It suit should

be brought by the bank upon the earlier notes, the action

of the bank may be defeated by evidence of the judgment in

this suit, and in that the record shows that the earlier

notes were in the possession of the bank after maturity,

there is no possibility that any other person may acquire

such title to them as will prevent the defendant, in an

action thereon, from pleading payment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

THE VILLAGE OF GLENCOE,  
Appellant,

vs.

ALBERT O. OLSON and MORTON  
T. CULVER,  
Appellees.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

204 I.A. 453

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, Village of Glencoe, filed its bill of interpleader in the Circuit Court, in which it named Albert O. Olson and Morton T. Culver as defendants. The bill in substance alleged that the defendants were severally claiming ownership of or an interest in certain warrants or vouchers for the payment of money out of a certain special assessment fund in the possession of the complainant; that the complainant was unable to tell to whom the warrants should be delivered or the money paid; and prayed that the defendants be required to interplead and adjust in court their respective claims and rights in and to the warrants.

The defendants filed their separate answers to the bill. The defendant Olson in his answer claimed the exclusive right to the warrants, and the defendant Culver by his answer disclaimed any interest in said warrants, or either of them, or in the money to be paid on such warrants out of the special fund.

The defendant Culver filed a cross-bill in the suit, in which, inter alia, he alleged that he disclaimed any interest in the warrants in question, and further that he "denied that said warrants, or either of them, in any way represented the amount for which complainant is indebted to

THE VILLAGE OF GLENCOE,  
Appellant,  
vs.  
ALBERT O. OLSON and NORTON  
T. OLIVER,  
Appellees.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

204-10783

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

The complainant, Village of Glencoe, filed its

bill of interpleader in the Circuit Court, in which it named Albert O. Olson and Norton T. Oliver as defendants.

The bill in substance alleged that the defendants were severally claiming ownership of or an interest in certain

warrants or vouchers for the payment of money out of a certain special assessment fund in the possession of the complainant; that the complainant was unable to tell to whom the warrants should be delivered or the money paid; and prayed that the defendants be required to interplead and adjust in court their respective claims and rights in and to the warrants.

The defendants filed their separate answers to

the bill. The defendant Olson in his answer claimed the exclusive right to the warrants, and the defendant Oliver by his answer disclaimed any interest in said warrants, or either of them, or in the money to be paid on such warrants out of the special fund.

The defendant Oliver filed a cross-bill in the

suit, in which, inter alia, he alleged that he disclaimed any interest in the warrants in question, and prayed that he "decide that said warrants, or either of them, in any way represented the amount for which complainant is indebted to



this defendant in said proceeding." It should be noted here that the allegation of the cross-complaint is not that the complainant is indebted to him in an amount greater than that represented by the warrants; his position is that he has no right or interest in or to the warrants in question, but that otherwise the complainant is indebted to him.

It is gathered from the pleadings and the facts disclosed by the evidence taken before the master to whom the case had been referred, that the Village of Glencoe had obtained by certain proceedings possession of what was described in the hearing as a special assessment fund, and that the Village had, by resolution adopted by its board of trustees, agreed to pay a certain percentage of the cost of the improvement for the doing of which the referred to special assessment fund was collected, by way of attorneys' fees for professional services to be rendered in the legal proceedings.

In the view we take of the questions involved in this case, we do not deem it necessary to recite here the rather intricate facts and the negotiations and the conversations as a result of which it is claimed by the defendant Culver that complainant had become indebted to him for certain services of value, which it is conceded were rendered by Culver in connection with the legal proceedings above referred to. Whether the complainant has by its conduct, or the conduct of its officials, become liable to the defendant Culver for the payment of any sum or sums of money may become an issue in other proceedings, and it is not intended to express any opinion here on this question further than to repeat that it is conceded that services of value have been rendered by Culver to the Village for which he has not up to this time been paid.



This defendant in said proceeding. It should be noted here that the allegation of the cross-complaint is not that the complainant is indebted to him in an amount greater than that represented by the warrants; his position is that he has no right or interest in or to the warrants in question, but that otherwise the complainant is indebted to him.

It is gathered from the pleadings and the facts disclosed by the evidence taken before the master to whom the case had been referred, that the Village of Chicago had obtained by certain proceedings possession of what was described in the pleadings as a special assessment fund, and that the village had, by resolution adopted by the board of trustees, agreed to pay a certain percentage of the cost of the improvement for the doing of which the referred to special assessment fund was collected, by way of attorney's fees for professional services to be rendered in the legal proceedings.

In the view we take of the questions involved in this case, we do not deem it necessary to recite here the rather intricate facts and the negotiations and the counteractions as a result of which it is claimed by the defendant Oliver that complainant had become indebted to him for certain services of value, which it is conceded were rendered by Oliver in connection with the legal proceedings above referred to. Whether the complainant has by its conduct, or the conduct of its officials, become liable to the defendant Oliver for the payment of any sum or sums of money may become an issue in other proceedings, and it is not intended to express any opinion here on this question further than to remark that it is conceded that services of value have been rendered by Oliver to the village for which he has not up to this time been paid.

On March 1, 1916, the court entered a decree in which, among other things, is recited:

"And the court having considered said bill of complaint and the several answers of the defendants, and having heard the arguments of counsel and being fully advised in the premises, and the said defendant, Morton T. Culver, having by his said answer and here in open court disclaimed any interest in said warrants or either of them, and the money to be paid out on such warrants or either of them, and consenting thereto, it is ordered, adjudged and decreed that said warrants number 7122 for \$1,003.25 and number 7123 for \$918.74, both dated January 18, 1916, issued by the complainant, the Village of Glencoe, payable to the order of the defendant, Albert O. Olson, with interest, and heretofore on or about January 24, A. D. 1916, by the said complainant deposited with the Clerk of this Court, be by said Clerk delivered over to said defendant, Albert O. Olson."

On June 27, 1916, the court entered a second decree in the cause, in which it is recited, among other things -

"That the defendant, Morton T. Culver, never made any claim to the warrants or vouchers brought into court herein by the complainant, or to any or either of them, before or subsequent to the filing of complainant's bill of complaint herein, and as to him complainant is not entitled to the relief in said bill of complaint prayed for, or any part thereof. The court further finds -

"That all of the material allegations contained in the cross-bill of the cross-complainant, Morton T. Culver, are proven to be true in substance and in fact, as therein alleged, and that he is entitled to the relief therein prayed for."

It was further ordered and adjudged by the decree that the complainant pay to the defendant Culver the sum of \$2,626.10 together with interest thereon from the date of entry.

Complainant by appeal brings the decree of June 27, 1916, here for review, and alleges as a principal reason for a reversal of the decree that the court had no jurisdiction to enter the decree on the cross-bill of the cross-complainant Culver.

Complainant's bill in substance alleges that complainant is in possession of two village warrants for the

On March 1, 1916, the court entered a decree in

which, among other things, is recited:

"And the court having considered the bill of complaint and the several answers of the defendants, and having heard the arguments of counsel and being fully advised in the premises, and the said defendant, Morton T. Oliver, having by his said answer and here in open court disclaimed any interest in said warrants or either of them, and the money to be paid out on such warrants or either of them, and consenting thereto, it is ordered, adjudged and decreed that said warrants number 7123 for \$1,000.00 and number 7124 for \$918.74, both dated January 15, 1916, issued by the complainant, the Village of Glenwood, payable to the order of the defendant, Albert O. Olson, with interest, and heretofore on or about January 24, A. D. 1916, by the said complainant deposited with the Clerk of this Court, be by said Clerk delivered over to said defendant, Albert O. Olson."

On June 27, 1916, the court entered a second

decree in the cause, in which it is recited, among other

things -

"That the defendant, Morton T. Oliver, never made any claim to the warrants or vouchers brought into court herein by the complainant, or to any or either of them, before or subsequent to the filing of complainant's bill of complaint herein, and as to him complainant is not entitled to the relief in said bill of complaint prayed for, or any part thereof. The court further finds -

"That all of the material allegations contained in the cross-bill of the cross-complainant, Morton T. Oliver, are shown to be true in substance and in fact, as therein alleged, and that he is entitled to the relief therein prayed for."

It was further ordered and adjudged by the court that the complainant pay to the defendant Oliver the sum of \$1,000.00 together with interest thereon from the date of entry.

Complainant by appeal brings the decree of June 27, 1916, here for review, and alleges as a principal reason for a reversal of the decree that the court had no jurisdiction to enter the decree on the cross-bill of the cross-complainant Oliver.

Complainant's bill in substance alleges that defendant is in possession of two alias warrants for the



payment of money out of a special assessment fund, which warrants were made payable to the order of the defendant Olson; that both defendants, Olson and Culver, were claiming ownership, title or interest in and to the warrants and the money to be paid thereon; and complainant by its bill submits the question of the several contentions of the defendants concerning the warrants and the money represented thereby to the trial court for determination.

The subject matter of the suit, as shown by the bill, was the warrants, and these were deposited with the court pending a final order or decree in the cause. It was alleged in the bill that the complainant's only interest in the warrants and the funds represented thereby was that the warrants be turned over to the person legally entitled to them.

The bill, as we read it, contained all of the elements necessary to a bill of interpleader. No claim is made by complainant against either of the defendants other than that they adjust in court their several claims to the warrants or funds in question. The bill did, indeed, allege that the complainant had not contracted any independent liability with either defendant except as shown in the bill itself. This assertion may be taken to relate to the warrants and funds in question. ✓ Whether complainant is or is not otherwise indebted to either defendant is not material under the issues presented by the bill. The bill prayed for a decree fixing the rights of the respective defendants to the warrants, and as we view this phase of the controversy, the court had no power to adjudicate the other questions and issues presented by the cross-bill of the cross-complainant Culver. As stated, the complainant disclaimed any and all interest in the subject matter of the suit, and it is not asking for any



... of some out of a special arrangement made, which  
warrants were made payable in the order of the defendant  
Olson; that both defendants, Olson and Oliver, were oblig-  
ing overwork, little or interest in and in the warrants  
and the money to be paid thereon; not complying with the  
bill and the question of the several defendants of  
the defendants concerning the warrants and the money  
represented thereby to the trial court for determination.  
The subject matter of the suit, as shown by  
the bill, was the warrants, and these were specified with  
the court rendering a final order or decree in the case. It  
was alleged in the bill that the complainant's only interest  
in the warrants and the funds represented thereby was that  
the warrants be turned over to the person legally entitled  
to them.  
The bill, as we read it, contained all of the  
allegations necessary to a bill of interpleader. No claim is  
made by complainant against either of the defendants other  
than that they adjust in court their several claims to the  
warrants or funds in question. The bill did, indeed, allege  
that the complainant had not contacted any independent im-  
plicitly with either defendant except as shown in the bill itself.  
This assertion may be taken to relate to the warrants and  
funds in question. Another complaint is that it is not otherwise  
indicated to either defendant is not material under the issues  
presented by the bill. The bill prayed for a decree fixing  
the rights of the respective defendants to the warrants, and  
as we view this phase of the controversy, the court had no  
power to adjudicate the other questions and issues presented  
by the complaint of the cross-complainant Oliver. As  
stated, the complainant disclosed only and all interest in  
the subject matter of the suit, and it is not seeing for any

affirmative relief against the defendants or either of them.

The complainant claims in its bill to be a mere stake holder; that it holds the subject-matter of the suit subject to the direction of the court, that it has no interest or claim thereto, and that it is asking for no affirmative relief against the defendants.

In Byers v. Sanson, 111 Ill. App. 578, the court approved the following quotation from an English case:

"I have a fund in my possession in which I claim no interest and to which you, the defendants, set up conflicting claims. Pay me my costs and I will bring the fund into court and you shall contest it between yourselves."

In Morrill v. Manhattan Life Ins. Co., 82 Ill. App., on page 417, the court said:

"In an interpleader suit the complainant's office is widely different from that of the complainant in an ordinary suit in equity. \* \* \* Here the complainant comes into court with the money in his hand to discharge an acknowledged debt \* \* \*. It is true he must show by his bill that each of the parties claims a right, else he makes out no case, but that is his whole case, and when the court sees by the respective answers that such defendants have made such a claim, I can perceive no well grounded reason for putting the complainant to other proof."

It is essential to a bill of interpleader that the party seeking relief should have incurred no independent liability to either party with reference to the subject-matter of the suit; that he should have acknowledged the title of neither in respect to the specific property in dispute, and that he claims no interest in the subject-matter himself. Bispham's Principles of Equity, 5th Ed., Sec. 421. Where defendants interplead without objection and go to trial on the issues, it is too late to raise the objection that the case is not a proper one for a bill of

Alternative relief against the defendants or either of them.  
The complainant claims in its bill to be a bona

state holder; that it holds the subject-matter of the suit  
subject to the direction of the court, that it has no in-  
terest or claim thereto, and that it is asking for no al-  
ternative relief against the defendants.

In Beyer v. Benson, 111 Ill. App. 578, the

court approved the following quotation from an English  
case:

"I have a fund in my possession in which I  
claim no interest and to which you, the defendants, set  
up conflicting claims. Pay me my costs and I will  
bring the fund into court and you shall contest it be-  
tween yourselves."

In Morrill v. Manhattan Life Ins. Co., 82 Ill.

App., on page 417, the court said:

"In an interpleader suit the complainant's  
office is widely different from that of the complainant  
in an ordinary suit in equity. \* \* \* Here the complain-  
ant comes into court with the money in his hand to dis-  
charge an acknowledged debt \* \* \*. It is true he must  
swear by his bill that each of the parties claims a  
right, else he takes out no case, but that is his whole  
case, and when the court sees by the respective answers  
that such defendants have made such a claim, I can per-  
ceive no well grounded reason for putting the complainant  
out to other proof."

It is essential to a bill of interpleader that

the party seeking relief should have incurred no independent  
liability to either party with reference to the subject-  
matter of the suit; that he should have acknowledged the  
title of neither in respect to the specific property in  
dispute, and that he claims no interest in the subject-  
matter himself. Whitman's Principles of Equity, 5th Ed.,  
Sec. 411. Where defendants interplead without objection and  
go to trial on the issues, it is too late to make the ob-  
jection that the case is not a proper one for a bill of



interpleader. Woodmen of the World v. Rutledge, 133 Cal. 640. No complaint is made by any of the parties to the case of the decree of March 1, 1916, and it is not urged that the bill of interpleader should have been dismissed on the filing of the separate answers of the defendants.

Irrespective of any other relations or contracts between the complainant and the defendants, the complainant had the right to appeal to a court of equity to protect it from the conflicting claims, - had there been such conflicting claims, - made by the defendants to the warrants or funds which constituted the subject-matter of the suit; and when by his answer the defendant Culver disclaimed any right or interest in and to the subject-matter, and when Olson, the other defendant, by his answer claimed the whole title and right to such subject-matter, which right or interest of Olson was in no sense denied by the complainant in its bill, a final decree should have been entered in the cause, which would have ended the litigation. Culver's disclaimer of interest in the subject-matter of the suit could not be regarded, and of course would not be urged, as res judicata of any other well founded claim that he might have against the complainant. No other claims were submitted under the pleadings prior to the filing of the cross-bill. The complainant sought the aid of the court to protect it, as it thought, from vexatious and expensive litigation, and as in legal effect all of the parties, by the bill and answers filed thereto, admitted the right of Olson to the whole subject-matter of the suit, this necessarily put an end to the case. The bill filed by complainant requested the court to determine the rights of the respective defendants to the money in the special assessment fund represented by the warrants.



interference. Verdict of the Court, 100 Cal. 2d. 500.  
 No complaint is made by any of the parties in the case of  
 the decree of March 1, 1916, and it is not until the  
 bill is interposed should have been filed on the filing  
 of the separate answers of the defendants.  
 Interspersive of any other relations of contract  
 between the complainant and the defendants, the complainant  
 had the right to appeal to a court of equity to protect it  
 from the conflicting claims, - had there been such conflicting  
 claims, - made by the defendants to the various claims  
 with connected and subject-matter of the suit; and when  
 by his answer the defendant Oliver disclosed any right or  
 interest in and to the subject-matter, and when Oliver, the  
 other defendant, by his answer claimed the whole title and  
 right to such subject-matter, which right or interest of  
 Oliver was in no sense denied by the complaint in the bill,  
 a final decree should have been entered in the court, which  
 would have shown the distribution. Oliver's disclaimer of in-  
 terest in the subject-matter of the suit could not be re-  
 fused, and of course would not be urged, as was indicated  
 of any other well founded claim that he might have against  
 the complainant. No other claims were asserted under the  
 pleadings prior to the filing of the cross-bill. The com-  
 plainant sought the aid of the court to protect it, as in  
 fact, from vexatious and oppressive litigation, and as in  
 legal effect all of the parties, by the bill and answers  
 filed thereto, admitted the right of Oliver to the whole sub-  
 ject-matter of the suit, this necessarily put on the de-  
 fendant. The bill filed by complainant requested the court to  
 determine the rights of the respective defendants to the money  
 in the special assessment fund represented by the warrants.

If Culver has any other right or interest to other moneys of the special assessment fund, we can see no reason why his rights thereto may not be determined in some other proper proceeding.

✓ The decree of June 27, 1916, will be reversed and the cause remanded with directions to dismiss the cross-bill of the defendant Culver without prejudice to any legal right which he may have to bring further action against the complainant, except as to the warrants and the moneys represented thereby involved in this cause.

REVERSED AND REMANDED  
WITH DIRECTIONS.

If Oliver has any other right or interest in other assets  
of the special assessment fund, we can see no reason why  
his rights thereto may not be determined in some other  
proper proceeding.

The decree of June 27, 1911, will be reversed  
and the same remanded with directions to dismiss the cross-  
bill of the defendant Oliver without prejudice to any legal  
right which he may have to bring further action against the  
complainant, except as to the warrants and the money rep-  
resented thereby involved in this cause.

REVERSED AND REMANDED

WITH DIRECTIONS.

G. S. COPPOLA,  
Appellee,

vs.

MARDEN, ORTH & HASTINGS  
COMPANY, a corporation,  
Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 454

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court against the defendant on a contract for the sale to plaintiff by defendant of 40 barrels of 50 gallons each of olive oil. It is contended by plaintiff that the contract provided for a 60 day credit; that defendant refused to deliver the oil to him on demand, and that plaintiff was compelled to go into the open market and purchase the oil at a much higher price than \$1.30 per gallon agreed upon. The defendant insists that it had never closed a contract for the sale of the oil with plaintiff; that plaintiff gave his order for the oil to a traveling salesman of defendant, but that the salesman had no authority from defendant to extend credit to plaintiff, and that defendant was not bound by the promise of its agent to deliver the oil on 60 days' credit as alleged by plaintiff. The defendant further contends that even if it be assumed that a valid contract had been entered into by the parties, the damages of plaintiff for its breach would be limited to interest upon the contract price agreed upon for the 60 day period of credit.

Upon the trial of the case by the court without a jury, the court found the issues against the defendant



APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

G. W. CORLEA,  
Appellee,  
vs.  
MADDER, ORT & HATTING  
COMPANY, a corporation,  
Appellant.

MR. JUSTICE DEAR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court against the defendant on a contract for the sale to plaintiff by defendant of 40 barrels of 50 gallons each of olive oil. It is contended by plaintiff that the contract provided for a 60 day credit; that defendant refused to deliver the oil to him on demand, and that plaintiff was compelled to go into the open market and purchase the oil at a much higher price than \$1.30 per gallon agreed upon. The defendant insists that it had never closed a contract for the sale of the oil with plaintiff; that plaintiff gave his order for the oil to a traveling salesman of defendant, but that the salesman had no authority from defendant to extend credit to plaintiff, and that defendant was not bound by the promise of its agent to deliver the oil on 60 days' credit as alleged by plaintiff. The defendant further contends that even if it be assumed that a valid contract had been entered into by the parties, the damages of plaintiff for its breach would be limited to interest upon the contract price agreed upon for the 60 day period of credit.

Upon the trial of the case by the court without

a jury, the court found the issues against the defendant

and assessed plaintiff's damages at the sum of \$1,537.50. Judgment was entered in favor of the plaintiff for this amount, and defendant brings the case here by appeal for review.

The defendant insists that there was no evidence from which the court was authorized to find that a contract had in fact been executed between the parties. There is much conflicting evidence in the record on this phase of the case. It is clear that defendant's salesman did have authority, as agent for the defendant, to solicit orders for oil from the plaintiff, and we are inclined to the opinion that there is evidence in the record which authorized the trial court to find that the agent had the implied authority to make the contract for the breach of which suit is brought. The correspondence introduced in evidence tended to show that the defendant intended to perform the contract made by its agent, and that its failure to do so was the result of a sudden and considerable increase in the market price of olive oil occurring shortly after the contract was made.

The trial court held as a proposition of law applicable to the facts of the case that -

"when a seller of goods who has agreed to deliver the same upon a credit of sixty days, refuses afterwards to deliver them to the buyer, except for cash, the damages of the buyer are the difference between the contract and market price of the goods at the various times when and at the place where the goods should be delivered under the contract, and if the buyer is unable to mitigate the damages by paying cash, the measure of damages of the buyer are not limited to the interest for the sixty days period on the contract price, because of the fact that the seller offered to deliver said goods at the contract price for cash."

This same proposition in somewhat different form was held in other propositions. The court refused to hold as a proposition of law applicable to the case -

and assessed plaintiff's damages at the sum of \$1,137.50.

Judgment was entered in favor of the plaintiff for this amount, and defendant brings the case here by appeal for review.

The defendant insists that there was no evidence

from which the court was authorized to find that a contract

had in fact been executed between the parties. There is

much conflicting evidence in the record on this phase of the case. It is clear that defendant's witnesses did have

authority, as agent for the defendant, to solicit orders

for oil from the plaintiff, and we are inclined to the

opinion that there is evidence in the record which authorized

the trial court to find that the agent had the implied

authority to make the contract for the purchase of which suit

is brought. The correspondence introduced in evidence

tended to show that the defendant intended to perform the

contract made by its agent, and that its failure to do so

was the result of a sudden and considerable increase in

the market price of olive oil occurring shortly after the

contract was made.

The trial court held as a proposition of law

applicable to the facts of the case that -

"When a seller of goods who has agreed to deliver the same upon a credit of sixty days, refuses afterwards to deliver them to the buyer, except for cash, the damages of the buyer are the difference between the contract and market price of the goods at the various times when and at the place where the goods should be delivered under the contract, and if the buyer is unable to mitigate the damages by paying cash, the measure of damages of the buyer are not limited to the interest for the sixty days period on the contract price, because of the fact that the seller offered to deliver said goods at the contract price for cash."

This same proposition is somewhat different from

was held in other propositions. The court refused to hold

as a proposition of law applicable to the case -



"that money, like the staples of commerce, is in legal contemplation always in the market and procurable at the lawful rate of interest; and that as a matter of law, the difference in the cost of an article payable at a certain price in cash on delivery, and the cost of the same article for the same purchase price payable in sixty days' time, is the interest at the lawful rate on said purchase price for said sixty days' period."

It is insisted by the defendant that the court erred in holding the proposition of law first above referred to, and in refusing to hold the proposition of law last above quoted, as applicable to the case. We are inclined to agree with the position of counsel for defendant on this question. It was conceded on the trial of the case that the defendant was ready at all times during the period of the year within which the contract was to be performed to sell and deliver to plaintiff the olive oil contracted for, for cash, at the contract price of \$1.30 per gallon. In giving his testimony the plaintiff stated that he had money in the bank with which he could, had he seen fit to do so, purchase oil during the year in question, although later in his testimony he denied this statement and insisted that he did not have money with which to buy for cash the oil contracted for. He does testify, however, that at various times during the year he bought, in all, 45 gallons of oil in the market, at prices varying between \$1.85 and \$2.20 per gallon - and this notwithstanding the fact that it is conceded in the record that he could at all times during that year have purchased the oil from defendant at the contract price of \$1.30 per gallon. Even if his last statement as to his lack of ready money to enable him to purchase the oil for cash be true, we are not impressed with the argument that in fairness he should be awarded as his damages the difference between the contract price of \$1.30 per gallon and the price which plaintiff says he actually paid for the oil in the open market. Plaintiff had been in the business of buying



"that money, like the staples of commerce, is in legal contemplation always in the market and procurable at the legal rate of interest; and that as a matter of law, the difference in the cost of an article payable in cash or in price in cash on delivery, and the cost of the same article for the same purchase price payable in sixty days' time, is the interest at the legal rate on said purchase price for said sixty days' period."

It is insisted by the defendant that the contract was in holding the proposition of law first above referred to, and in refusing to hold the proposition of law last above quoted, as applicable to the case. We are inclined to agree with the position of counsel for defendant on this question. It was conceded on the trial of the case that the defendant was ready at all times during the period of the year within which the contract was to be performed to sell and deliver to plaintiff the olive oil contracted for, for cash, at the contract price of \$1.30 per gallon. In giving his testimony the plaintiff stated that he had money in the bank with which he could, had he seen fit to do so, purchase all during the year in question. Although later in his testimony he denied this statement and insisted that he did not have money with which to pay for cash the oil contracted for. He does testify, however, that at various times during the year he bought, in all, 45 gallons of oil in the market, at prices varying between \$1.65 and \$2.20 per gallon - and this notwithstanding the fact that it is conceded in the record that he could at all times during that year have purchased the oil from defendant at the contract price of \$1.30 per gallon. Even if his last statement as to his lack of ready money to enable him to purchase the oil for cash be true, we are not impressed with the argument that in fairness he should be awarded as his measure the difference between the contract price of \$1.30 per gallon and the price which plaintiff says he actually paid for the oil in the open market. Plaintiff has been in the business of buying

and selling olive oil in the market for a period of 30 years, and it is not easy to believe his statement that he in fact paid \$1.85 to \$2.20 per gallon for oil which it is conceded he could, at the same time, have procured for cash at the price of \$1.30 per gallon.

"A party injured by a breach of contract must make reasonable exertions to render the injury as light as possible; and he cannot recover for any loss which he might have avoided with ordinary care and reasonable expense. This rule is especially applicable where one of the contracting parties has acquired notice of the breach of contract and makes no reasonable effort to mitigate the damages claimed." 13 Cyc. 72.

Clearly it was the duty of plaintiff, on the breach of his contract with the defendant, to use every reasonable effort to minimize the damages accruing to him as the result of such breach. As a prudent business man, experienced in the particular kind of business which formed the subject matter of the contract, he could without great difficulty have found persons or banks ready and willing to loan sufficient money to him to enable him to purchase the oil in question, on the security of his contract with the defendant, or of the oil which it is conceded the defendant would have delivered for cash at the low contract price.

The rule seems to be well established by authority that where one who has agreed to deliver personal property under the terms of a contract for the sale of such property on credit, refuses to deliver such property for credit, but does stand ready to make delivery upon the terms of the contract for cash, the measure of damages to the vendee under such circumstances is the legal rate of interest upon the contract price of the property in question for the period of time for which credit was to be extended. *Mechem on Sales*, secs. 1754-55.

In Warren v. Staddart, 105 U. S. 224, the court said:

and selling olive oil in the market for a price of 20  
cents, and it is not wrong to believe that that is  
in fact paid 1.85 to 2.20 per gallon for oil which it is  
conceded he could, at the same time, have procured for a  
at the price of 1.50 per gallon.

"A party injured by a breach of contract must  
take reasonable exertions to render the injury as light  
as possible; and he cannot recover for any loss which  
he might have avoided with ordinary care and reasonable  
expense. This rule is especially applicable where one  
of the contracting parties has received notice of the  
breach of contract and makes no reasonable effort to  
mitigate the damages claimed." 13 Ye. 72.

Clearly it was the duty of plaintiff, on the breach

of his contract with the defendant, to use every reasonable  
effort to minimize the damages accruing to him as the result of  
such breach. As a prudent business man, experienced in the  
particular kind of business which formed the subject matter of  
the contract, he could without great difficulty have found  
persons or banks ready and willing to loan sufficient money  
to him to enable him to purchase the oil in question, on the  
security of his contract with the defendant, or of the oil  
which it is conceded the defendant would have delivered for  
cash at the low contract price.

The rule seems to be well established by authority

that where one who has agreed to deliver personal property  
under the terms of a contract for the sale of such property  
on credit, refuses to deliver such property for a credit, but

does stand ready to make delivery upon the terms of the

contract for cash, the measure of damages is the value

under such circumstances is the legal rate of interest upon  
the contract price of the property in question for the period  
of time for which credit was to be extended. *Wheeler on Sales*,

secs. 1734-35.

In *Wheeler v. Wheeler*, 105 U. S. 234, the court said:



"The damages sustained by Warren because he did not get the thirty days' credit which he thinks he was entitled to, is not to be measured in that way. \* \* \* \* If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders."

The legal principle which seems to be applicable to cases similar to the one at bar is that stated in the authorities here referred to. While it may not be necessary to a decision of this case, we are inclined to believe, as asserted by Sutherland in his work on Damages, vol. 1, 3rd Ed., sec. 76, that "money, like the staples of commerce, is in legal contemplation, always in the market and procurable at the lawful rate of interest \* \* . No party's condition, in respect to the measure of damages, should be worse for having failed in his engagement to a person whose affairs are embarrassed than if the same result had occurred with one in prosperous or affluent circumstances."

Counsel for the plaintiff have called our attention to well considered cases which tend, in a measure, to support the propositions urged by plaintiff, but we are inclined to follow the authorities herein referred to.

The trial court erred in its application of a measure of damages to the facts of this case. Plaintiff is entitled only to the legal rate of interest upon the contract price for the merchandise which he had agreed to purchase from the defendant, for a period of 60 days; this would amount to the sum of \$21.67.

The judgment of the Municipal Court is reversed and judgment is entered here in favor of the plaintiff for the sum of \$21.67, with costs against plaintiff here and below.

REVERSED AND JUDGMENT HERE.



"The damages sustained by Carter because he did not get the thirty days' credit which he thought he was entitled to, is not to be measured in that way. \* \* \* If defendant violated his contract with Carter in refusing to fill his order except for cash, the measure of Carter's damages would be the interest for thirty days on the amount of cash paid on his order."

The legal principle which seems to be applicable to cases similar to the one at bar is that stated in the authorities here referred to. While it may not be necessary to a decision of this case, we are inclined to believe, as suggested by defendant in his work on damages, vol. 1, 271, 272, etc., that "money, like the staples of commerce, is in legal contemplation, always in the market and procurable at the legal rate of interest \* \* \*. To deny a condition, in respect to the measure of damages, should be worse for having failed in his engagement to a person whose affairs are embarrassed than if the same result had occurred with one in prosperous or affluent circumstances."

Comment for the plaintiff have called our attention to well considered cases which tend, in a measure, to support the propositions urged by plaintiff, but we are inclined to follow the authorities herein referred to.

The trial court erred in its application of a measure of damages to the facts of this case. Plaintiff is entitled only to the legal rate of interest upon the contract price for the merchandise which he had agreed to purchase from the defendant, for a period of 30 days; this would amount to the sum of \$21.67.

The judgment of the Municipal Court is reversed and judgment is entered here in favor of the plaintiff for the sum of \$21.67, with costs against plaintiff here and below.

GEORGE MEYER, doing business  
as GEORGE MEYER & CO.,  
Appellee,

vs.

WESTERN COLD STORAGE COMPANY,  
a corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 456

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court against the defendant for \$735.09. The case was tried by the court without a jury.

It appears from the evidence that the plaintiff stored on different dates from November 21, 1913, to December 21, 1913, 6474 pounds of poultry in the warehouse of the defendant. This poultry was re-delivered by the defendant to the plaintiff on different dates between February 17, 1914, and June 22, 1915. It was alleged in the statement of claim filed by the plaintiff that the defendant had so handled and cared for the poultry in question that through its negligence it had become decayed and unfit for food purposes, and unmarketable. In the affidavit of merits filed by the defendant to plaintiff's claim, it was alleged that the plaintiff was indebted to defendant in the sum of \$40.81 for storage charges for the poultry in question.

It is insisted on behalf of defendant that the evidence heard on the trial did not tend to prove that the defendant was guilty of any negligence in its care and handling of the poultry. The evidence submitted to the court by the plaintiff tended to show that the poultry was in good condition at the time it was delivered to the defendant. Plaintiff, testifying in his own behalf, stated that he was

GEORGE EATON, doing business  
as GEORGE EATON & CO.,  
Appellee,

vs.

WESTERN GOLD STORAGE COMPANY,  
a corporation,  
Appellant.

APPEAL FROM THE CIRCUIT COURT  
OF CHICAGO.

504 I. A. 438

THE JUSTICE NEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the United

circuit Court against the defendant for \$735.00. The case

was tried by the court without a jury.

It appears from the evidence that the plaintiff

stored on different dates from November 21, 1913, to December

21, 1913, 644 pounds of poultry in the warehouse of the

defendant. This poultry was re-delivered by the defendant

to the plaintiff on different dates between February 17,

1914, and June 22, 1915. It was alleged in the statement

of claim filed by the plaintiff that the defendant had so

handled and cared for the poultry in question that through

its negligence it had become diseased and unfit for food pur-

poses, and unmarketable. In the affidavit of merit filed

by the defendant to plaintiff's claim, it was alleged that

the plaintiff was indebted to defendant in the sum of

\$40.01 for storage charges for the poultry in question.

It is insisted on behalf of defendant that the

evidence heard on the trial did not tend to prove that the

defendant was guilty of any negligence in its care and han-

dling of the poultry. The evidence submitted to the court by

the plaintiff tended to show that the poultry was in good

condition at the time it was delivered to the defendant.

Plaintiff, testifying in his own behalf, stated that he was



familiar with the usual practice of preparing poultry for cold storage; that the poultry in question, before it was delivered to the defendant, was scalded and picked, laid in ice water over night, and in the morning taken out and dried, and then packed in boxes and sent to a cooler; that this was the usual and customary practice of preparing poultry for cold storage; that he had examined the particular poultry in question before it was delivered to defendant, and that he had helped with its packing; that he had examined every box thereof, and that it was in good condition when it was delivered to defendant. A witness called by the defendant testified that he was an employe of defendant and had charge of deliveries to its warehouse; that it was his duty to examine goods that were offered for storage, and that he had accepted for defendant the poultry in question; that it was his duty to receive packages for storage, and "if they are off odor or off condition, to specify that on a receiving card. \* \* \* I examined the number of packages received, but not the quality, and I mean when I say they are in off condition that is if the poultry is slippery or a bad odor. It is my duty to receive poultry over there, and if I notice poultry delivered in an off condition, I mark a memorandum receipt and issue it to the teamster in that manner. \* \* \* I did not mark any of these receipts with a notation that they were slippery, or in other words, bad order."

The evidence satisfactorily shows that the poultry in question was in good condition at the time it was received by the defendant for storage, and there does not seem to be any evidence in the record which tends to show that the poultry was not in the deteriorated condition claimed by plaintiff at the times it was re-delivered to him; in other words, we think it is fairly inferable from all of the



Familiar with the usual practice of preparing poultry for cold storage; that the poultry in question, before it was delivered to the defendant, was scalded and picked, laid in ice water over night, and in the morning taken out and dried and then packed in boxes and sent to a cooler; that this was the usual and customary practice of preparing poultry for cold storage; that he had examined the particular poultry in question before it was delivered to defendant, and that he had helped with its packing; that he had examined every box thereof, and that it was in good condition when it was delivered to defendant. A witness called by the defendant testified that he was an employee of defendant and had charge of deliveries to its warehouse; that it was his duty to examine goods that were offered for storage, and that he had accepted for defendant the poultry in question; that it was his duty to receive packages for storage, and "if they are off color or off condition, to specify that on a receiving card. \* \* \* I examined the number of packages received, but not the quality, and I mean when I say they are in off condition that is if the poultry is slippery or a bad odor. It is my duty to receive poultry over there, and if I receive poultry delivered in an off condition, I mark a memorandum receipt and issue it to the transporter in that manner. \* \* \* I did not mark any of these receipts with a notation that they were slippery, or in other words, bad order."

The evidence satisfactorily shows that the poultry in question was in good condition at the time it was received by the defendant for storage, and there does not seem to be any evidence in the record which tends to show that the poultry was not in the deteriorated condition claimed by plaintiff at the time it was re-delivered to him; in other words, we think it is fairly inferable from all of the

evidence heard at the trial that the defective condition of the poultry, whatever its cause, occurred during the time that it was in the possession of the defendant.

Paragraph 261, section 21, chapter 114, of the Revised Statutes of the State of Illinois, Hurd's 1916, 2122, provides as follows:

"A warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

No claim is asserted that any special agreement was made between the parties for storage of the poultry in question, and the liability of defendant, if any, must depend upon the character of the care which the evidence tended to show was exercised in connection with the storage of the poultry.

It is earnestly insisted by counsel for defendant that the defendant, under the evidence in the record, cannot be charged with negligence in the performance of its contract with the plaintiff. From an examination of all the evidence in the record we are inclined to the view that whether defendant was or was not guilty of negligence, became a question of fact for the determination of the trial court, and that there was evidence heard at the trial from which the trial judge was warranted in his finding that the defendant had, in fact, been guilty of negligence. The evidence introduced by the defendant tended to show that the goods were properly kept in rooms 16 and 26 of warehouse "J", and that at no time was the temperature of such rooms allowed to become or remain above the freezing point. In rebuttal of this, the plaintiff testified that he had received a transfer notice which was introduced in evidence, that 2504 pounds of the

evidence heard at the trial that the defective condition of the poultry, whatever its cause, occurred during the time that it was in the possession of the defendant.

Paragraph 261, section 21, chapter 114, of the

Revised Statutes of the State of Illinois, enacted 1812,

§122, provides as follows:

"A warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

No claim is asserted that any special agreement

was made between the parties for storage of the poultry in question, and the liability of defendant, if any, must depend upon the character of the care which the evidence tended to show was exercised in connection with the storage of the poultry.

It is earnestly insisted by counsel for defendant that the defendant, under the evidence in the record, cannot be charged with negligence in the performance of its contract with the plaintiff. From an examination of all the evidence in the record we are inclined to the view that whether defendant was or was not guilty of negligence, depends upon a question of fact for the determination of the trial court, and that there was evidence heard at the trial from which the trial judge was warranted in his finding that the defendant had, in fact, been guilty of negligence. The evidence introduced by the defendant tended to show that the goods were properly kept in rooms 16 and 24 of warehouse "1", and that at no time was the temperature of such rooms allowed to become so high as the freezing point. In rebuttal of this, the plaintiff testified that he had received a transfer notice



poultry had been transferred from warehouse "J", which was known as a "freezer," to warehouse "T", described by the witness as a "cooler." Much argument is made that under the statute above quoted a prima facie case was not made out by proof only of the sound condition of the goods at the time of storage, and also of the defective condition of the same goods at the time of re-delivery; that the law imposed upon the plaintiff in this case the burden of showing some act of negligence, either of commission or omission, which caused the deterioration of the poultry received for storage by defendant.

It is conceded with reference to the storage of personal property and merchandise generally, where it is shown by a bailor that such property is delivered to a bailee for storage in good condition, and is re-delivered to the bailor in bad condition, that a prima facie case of negligence is thereby made out, and that the burden of proof as to the cause of the defective condition thereafter shifts from the bailor to the bailee; but it is contended for the defendant, on the authority of the case of Patterson v. Wenatchee, 53 Wash. 155, and other cases, that this rule has no application to a case where the property ~~is~~ stored is perishable in its nature. It was held in the case of Patterson v. Wenatchee, supra, that,

"It is within the common knowledge of all men that meat in storage will spoil, will become damaged through internal defects, or through the operation of natural causes. So that even though the meat in this case, when brought to the respondent's warehouse, was in first class condition, and the jury so believed, the loss and damage complained of might have occurred to some extent at least without negligence on the part of the bailee, and the instruction as given, not recognizing this fact nor providing for any qualification, was, in our opinion, error."

We are not quite certain that the learned judge who wrote the opinion in the above case is correct when he



property has been transferred from warehouse "A", known as a "warehouse", to warehouse "B", described by the witness as a "warehouse". Such argument is made that under the statute above quoted a prima facie case is made out by proof of the prima facie condition of the goods at the time of storage, and also of the defective condition of the same goods at the time of re-delivery; that the law imposed upon the defendant in this case the burden of showing some act of negligence, either of commission or omission, which caused the deterioration of the property received for storage by defendant.

It is conceded with reference to the storage of personal property and merchandise generally, where it is shown by a bailor that such property is delivered to a bailee for storage in good condition, and is re-delivered to the bailor in bad condition, that a prima facie case of negligence is thereby made out, and that the burden of proof as to the cause of the defective condition thereafter shifts from the bailor to the bailee; but it is contended for the defendant, on the authority of the case of Wentworth v. Wentworth, 25 Wash. 100, and other cases, that this rule has no application to a case where the property is stored in a warehouse in its nature. It was held in the case of Wentworth v. Wentworth, supra, that

"It is within the common knowledge of all men that goods in storage will, if left undisturbed, through internal defects, or through the operation of natural causes, be deteriorated. In such cases, when brought to the respondent's warehouse, and found in bad condition, and the goods so delivered, and damage complained of might have occurred in some extent at least without negligence on the part of the bailee, and the instruction as given, not recognizing this fact and providing for any possibility, was, in our opinion, error."

It is not quite certain that the learned judge was right in the opinion in the above case is correct.

states that it is within the common knowledge of all men that meat, when deposited in a warehouse in first class condition, might thereafter become damaged through internal defects or through the operation of natural causes, and without any negligence on the part of the bailee. The expert testimony heard on the trial of the case at bar tends to show that when perishable goods are received for cold storage, and are properly frozen at the time of receipt, no change occurs in such goods while kept in such frozen condition, and that if deterioration had, in fact, set in before storage, such deterioration would become arrested by the process of freezing. Whether perishable goods may be regarded as an exception to the rule above referred to applicable to other property and merchandise generally, we are of opinion that there is some evidence in this record from which the trial court was warranted in finding that the defendant had, in fact, been guilty of negligence. Our attention has not been called to any case determined by the courts of review of this State which passes upon the precise question here involved, but we are inclined to think that it would not be in the public interest to create the exception to the general rule applicable to bailments of personal property insisted upon by the defendant. The business of cold storage of perishable food products, within relatively recent years, has grown to large proportions. A large percentage of food products sold to the public is, for a greater or less period of time, stored in warehouses, and we can see no adequate reason why bailees of property and merchandise of this character should be made an exception to the long-existing and salutary rule applicable to bailments of personal property generally.

The measure of damages in a case such as the one at bar is the market value of the goods at the time they are

states that it is within the common knowledge of all men that meat, when deposited in a warehouse in first class condition, might thereafter become damaged through internal defects or through the operation of natural causes, and without any negligence on the part of the bailee. The expert testimony heard on the trial of the case at bar tends to show that when perishable goods are received for cold storage, and the property frozen at the time of receipt, no change occurs in such goods while kept in such frozen condition, and that in deterioration had, in fact, and in the store, such deterioration would become arrested by the process of freezing. Whether perishable goods may be regarded as an exception to the rule above referred to applicable to other property and merchandise is, generally, a matter of opinion, but there is no evidence in this record from which the trial court was warranted in finding that the defendant had, in fact, been guilty of negligence. Our attention has not been called to any case determined by the court of review of this state which passes upon the precise question here involved, but we are inclined to think that it would not be in the public interest to create the exception to the general rule applicable to perishable goods of personal property insisted upon by the defendant. The business of cold storage of perishable food products, which relatively recent years, has grown to large proportions. A large percentage of food products sold in the United States, for a greater or less period of time, passed through the hands of cold storage warehouses, and we can see no adequate reason why the rule of property and maintenance of this character should be made an exception to the long-standing and established rule applicable to all other kinds of personal property generally.

The measure of damages in a case such as the one at bar is the market value of the goods at the time they are



taken from the warehouse, less the charges for storage.

Western Union Cold Storage Co. v. Ermeling, 73 Ill. App. 394.

It is not clear just what rule for the measure of damages was applied by the trial court, but we are inclined to the view that there was sufficient evidence to warrant the court in finding, as it did, that the loss to the plaintiff by reason of the defective condition of the poultry was 11-1/2 cents a pound, the amount which seems to have been allowed by the trial judge. By computation it is evident that the trial court allowed the sum of \$40.81 for storage charges claimed to be due from plaintiff to defendant.

Finding no error in the findings and judgment of the trial court, the judgment of that court will be affirmed.

**AFFIRMED.**



taken from the warehouse, less the charges for storage.  
Western Union Gold Storage Co. v. Fidelity, 75 Ill. App. 344.  
 It is not clear just what rule for the measure of damages was  
 applied by the trial court, but we are inclined to the view  
 that there was sufficient evidence to warrant the court in  
 finding, as it did, that the loss to the plaintiff by reason  
 of the defective condition of the poultry was 11-1/2 cents  
 a pound, the amount which seems to have been allowed by  
 the trial judge. By computation it is evident that the  
 trial court allowed the sum of \$40.51 for storage charges  
 claimed to be due the plaintiff to defendant.

Finding no error in the findings and judgment  
 of the trial court, the judgment of that court will be af-  
 firmed.

APPROVED.

308 - 22742.

204 I.A. 474

WILLIAM T. MONROE,  
Appellee,

vs.

CLARE A. ORR, et al.,

BERTHA ORR,  
Appellant.

APPEAL,

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The cause on this appeal is the same as in Writ of Error Gen. No. 22616 and has been consolidated for hearing with that of the writ of error. The record in the error case is the same as that before us on this appeal. The parties in both causes are represented by the same counsel and the judgment against appellant here is for the same amount as that against the plaintiff in error in 22616. The abstract is of the same record and the briefs and arguments are the same as those filed in the writ of error case, except for the substitution of the name of appellant in place of that of Gustave A. Becker, plaintiff in error.

The opinion this day filed in case Gen. No. 22616 is decisive on every material point of the questions involved in this appeal. There is only one varying circumstance, which is, that while Gustave A. Becker testified, appellant did not. However, his testimony being offered on behalf of all the defendants, is on every material point equally binding upon appellant and her co-defendant in the trial court.

While the statement of values in the inventory might not bind appellant, still, as is inferable from our

208 - 23723

WILLIAM F. BAKER, Appellant,  
vs.  
CLARA A. ORR, et al., Appellees.  
Circuit Court,  
Cook County, Illinois.

U.S. JUSTICE ROBERT H. JACKSON AND THE CHIEF OF THE COURT.

The cause on this appeal is the same as in writ of error No. 23616 and has been consolidated for hearing with that of the writ of error. The record in the error case is the same as that before me on this appeal. The parties in both cases are represented by the same counsel and the judgment against appellant here is for the same amount as that against the plaintiff in error in 23616. The abstract is of the same record and the briefs and arguments are the same as those filed in the writ of error case, except for the substitution of the name of appellant in place of that of Gustave A. Becker, plaintiff in error. The opinion this day filed in case No. 23616 is decisive on every material point of the questions involved in this appeal. There is only one varying circumstance, which is, that while Gustave A. Becker testified, appellant did not. However, his testimony being adverse on behalf of all the defendants, is on every material point equally binding upon appellant and her co-defendants in the trial court.

While the statement of value in the inventory might not bind appellant, still, as it is admissible, it is

2.

opinion supra, under the plea of riens per descent and the replication thereto. The falsity of that plea having been proven by testimony of both plaintiff's and defendants' witnesses, proof of the values of land descending from the ancestor to the defendant heirs was unnecessary.

For the reasons set forth herein and in the opinion supra, the judgment of the Circuit Court is affirmed.

AFFIRMED.



By the evidence, under the law as stated in the opinion above, the validity of the plaintiff's claim is proven by testimony of both plaintiff's and defendant's witnesses, proof of the value of land described. That the answer to the defendant's claim was unnecessary.

For the reasons and facts herein and in the

opinion above, the judgment of the Circuit Court is

affirmed.

APPROVED.

JOHN LADLE, Jr., by JOHN  
LADLE, his next friend,  
Appellee,

vs.

CITY OF CHICAGO, a municipal  
corporation, A. BENSON and  
EMMA BENSON, his wife,  
Appellants.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

204 I.A. 475

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the City of Chicago, from a judgment of \$10,000 in an action for personal injuries. The declaration originally consisted of two counts, to which the two Bensons, defendants, interposed a general demurrer, and the City of Chicago a plea of the general issue. The demurrer was sustained and plaintiff took leave to amend but never did so. Subsequently the pleadings were amended by discontinuing as to the Bensons and the first count was instructed out of the case.

The second count avers that in front of No. 2132 West 25th street, Chicago, the City laid out and constructed a cinder sidewalk that was elevated a considerable distance, viz., about four feet above and in front of a lot which was vacant, and that the City had constructed a wooden fence or railing along such walk for the purpose of guarding and protecting persons lawfully upon the sidewalk from falling into the vacant lot from the sidewalk; that it was the duty of the City to use ordinary diligence to maintain and keep said fence or guard-rail in good repair so that persons lawfully on said sidewalk might escape injury; that defendants disregarded their duty in that regard and knowingly permitted the fence to become rotten and decayed and

1941-1942

1. The first of these is the fact that the  
the second is the fact that the  
the third is the fact that the

374. A. 1169

FROM THE 1950S TO THE 1970S, THE UNITED STATES WAS THE LEADING

This is an appeal by the respondent, the City.

[illegible]

1. The City of Chicago, Illinois, has with it and con-  
 sidered a similar situation that was situated in a similar  
 distance, viz., about four feet above and in front of a lot  
 which was vacant, and that the City had constructed a wooden  
 fence or railing along such wall for the purpose of preventing  
 and protecting persons lawfully upon the sidewalk from fall-  
 ing from the vacant lot from the sidewalk; that it was the  
 duty of the City to use ordinary diligence to maintain and  
 keep said fence or guard-rail in good repair so that per-  
 sons lawfully on said sidewalk might escape injury; that  
 defendants disregarded their duty in that regard and know-

in bad condition for a long period of time, and that while plaintiff, on the 2nd of August, 1912, was, in the exercise of ordinary care for his own safety, walking along said sidewalk, owing to the negligence of defendant and the defective condition of the fence he fell off the sidewalk into the lot with great force and violence and was seriously injured.

It is insisted that the demurrer of the Bensons to the declaration disposed of the case as against the City also. This does not necessarily follow. The declaration may have stated a good cause of action against the City, but not a good cause of action against the other defendants.

Failure to amend the declaration after the sustaining of the demurrer against the Bensons operated as a discontinuance of the suit against them, which was afterwards made effective by an order dismissing them out of the case.

The evidence discloses that plaintiff, a very young lad, was playing upon the sidewalk in question and that childlike he was having a dispute with a little girl; that at the time the accident occurred he was sitting on the edge of the sidewalk above the vacant lot with his feet hanging over, and that the little girl with whom he was disputing thoughtlessly, we assume, and without realizing the consequences of her act, gave plaintiff a push which resulted in his falling into the lot and sustaining the injuries complained of.

These are the evidential facts regarding the accident as we find them from the proofs. These proofs vary materially and fail to prove in every essential particular the negligence charged in the declaration, which was that plaintiff, in the exercise of due care, was walking



in bad condition for a long period of time, and that while  
black and white, in the end of August, 1911, was in the  
of custody for his own safety, being along with  
evidence, owing to the negligence of defendant and the  
positive condition of his face he fell off the sidewalk  
into the lot with great force and violence and was seriously  
injured.

It is insisted that the character of the persons  
to the declaration disclosed of the case as against the City  
also. This does not necessarily follow. The declaration  
has been stated a good cause of action against the City,  
but not a good cause of action against the other defendants.  
Failure to amend the declaration after the sus-  
tained of the demurrer against the persons operating as a  
discontinuance of the suit against them, which was after-  
wards made effective by an order dissolving them out of  
the case.

The evidence discloses that plaintiff, a very  
young lad, was playing upon the sidewalk in question and that  
childlike he was having a fight with a little girl; that  
at the time the accident occurred he was sitting on the edge  
of the sidewalk above the vacant lot with his feet hanging  
over, and that the little girl with whom he was fighting  
thrust herself, or rather, and without realizing the conse-  
quences of her act, gave plaintiff a push which caused  
him to fall into the lot and sustaining the injuries  
complained of.

There are no substantial facts regarding the  
accident as we find them from the facts. These facts  
very carefully and fail to prove in every essential par-  
ticular the negligence charged in the declaration, which was  
that plaintiff, by the negligence of his mother, was walking

along the sidewalk, and owing to the negligence of defendant and the defective condition of the fence in front of the vacant lot, fell off the walk and was injured. Plaintiff himself testified that he was sitting down at the edge of the sidewalk near the fence; that his feet were hanging down in the adjoining lot, "and the girl came and she bumped me, pushed me, and I fell."

The accident is not attributable to the condition of the fence. The condition of the fence was not the proximate or primary cause of the accident. No negligence on the part of the City in any manner contributed in any degree to the accident. The accident resulted from plaintiff sitting upon the edge of the sidewalk and the little girl pushing him so that he fell from the walk into the lot. In no way can these events be traceable to any negligence on the part of the City in the maintenance of the sidewalk or the fence. These facts appeared from plaintiff's own proofs.

At the conclusion of the plaintiff's proofs the City moved for an instructed verdict in its favor and raised the question of variance between the allegata and probata. The motion to instruct was denied, to which ruling the City excepted. The ruling of the court refusing to instruct a verdict for the City, as requested, was reversible error. In the condition of the proofs there was no evidence supporting the negligence charged against the City in the declaration. The verdict and judgment are consequently contrary to the manifest weight of the evidence. It cannot be said that the injury to plaintiff was either the natural or probable result of the negligence of the City. Seith v. Commonwealth Electric Company, 241 Ill. 252.

about the accident, and owing to the negligence of defendant and the defective condition of the fence in front of the property, the plaintiff was injured. The plaintiff also testified that he was sitting down at the edge of the sidewalk near the fence; that his feet were hanging down in the gutter, and that the car came and struck him, and I said, "and I tell."

The accident is not attributable to the condition of the fence. The condition of the fence was not the proximate or primary cause of the accident. No negligence on the part of the city in any manner contributed in any degree to the accident. The accident resulted from the plaintiff sitting upon the edge of the sidewalk and his feet hanging down, and he fell from the sidewalk into the gutter. In no way can these events be considered as any negligence on the part of the city in the maintenance of the sidewalk or the fence. These facts appear from plaintiff's own testimony. As the conclusion of the plaintiff's theory the jury moved for an instructed verdict in its favor and asked the question of variance between the affidavit and deposition. The motion was granted and denied, so much during the city's testimony. The ruling of the court refusing to instruct a verdict for the city, as requested, was reversible error. In the admission of the facts there was no evidence supporting the defendant's contention that the city in the defendant's negligence caused plaintiff's injury in the accident. The verdict and judgment are accordingly reversed and the plaintiff's motion for a new trial is granted. It cannot be said that the injury to plaintiff was either the result of the negligence of the city or the negligence of the defendant. Reversed and remanded. All the costs.

Under the pleadings and proofs no cause of action has been established against the City of Chicago; therefore the judgment of the Superior Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.



Under the provisions and terms of the  
 also has been established against the City of Chicago; there-  
 fore the judgment of the Superior Court is reversed with a  
 finding of fact.

REVEREND WITH FINDING OF FACT.

270 - 22704

FINDING OF FACT.

The Court finds as an ultimate fact that plaintiff failed to prove that defendant the City of Chicago was guilty of any negligence charged in the declaration.

ALBANY, N. Y.

The Board finds as an undisputed fact that the  
first trial to prove that defendant the City of Albany was  
guilty of very negligence charged in the declaration.

WISCONSIN LIME AND CEMENT  
COMPANY, a corporation,  
Appellee,

vs.

THOMAS A. REED et al.,  
Appellants,  
Appeal of FRANCIS W. JONES  
and BREMA M. JONES.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

204 I.A. 479

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a bill to establish a mechanic's lien upon certain realty in Cook County owned by the defendants Francis W. and Brema M. Jones. A decree in accord with the recommendations of a master's report was entered granting the lien prayed for, \$241.04, with interest thereon, and the realty owner defendants bring this appeal in an effort to reverse that decree.

The complainant was a dealer in brick, plaster and other building materials, and had sold to the defendant J. S. Reed materials part of which were used by Reed in his business as a contractor in a building for Francis W. and Brema M. Jones at 4232 Prairie avenue, Chicago, and part in what is designated as the "Harney job" at 4538 Forrestville avenue, Chicago.

Francis W. Jones was president of the German Oil and Chemical Company, and gave its check, payable to the order of complainant, for \$416.10, signed by himself as president, to Thomas Reed, the father of J. S. Reed, who was interested with his son in the contracting business. It seems that this check, payable to complainant,



WISCONSIN LIME AND CEMENT  
COMPANY, a corporation,  
Appellant,

vs.

THOMAS A. REED et al.,  
Appellees,  
Appeal of FRANCIS W. JONES  
and ELLIOT M. JONES.

STATE OF WISCONSIN  
OF COOK COUNTY.

2041A.479

THE JUSTICE CLERK DELIVERED THE DECISION OF THE COURT.

This is a bill to establish a mechanic's lien upon certain realty in Cook County owned by the defendants Francis W. and Emma M. Jones. A decree in accord with the recommendations of a master's report was entered granting the lien prayed for, \$241.04, with interest thereon, and the really owner defendants bring this appeal in an effort to reverse that decree.

The complaint was a dealer in brick, plaster and other building materials, and had sold to the defendants J. E. Reed materials part of which were used by Reed in his business as a contractor in a building for Francis W. and Emma M. Jones at 4323 Prairie Avenue, Chicago, and part in what is designated as the "Garvey job" at 4323 Northwestern Avenue, Chicago.

Francis W. Jones was president of the German Oil and Chemical Company, and gave its check, payable to the order of complainant, for \$418.10, signed by himself, as president, to Thomas Reed, the father of J. E. Reed, who was interested with his son in the contracting business. It seems that this check, payable to complainant,

was given by Jones to Reed as the result of a conversation between them as to the amounts that were then due subcontractors on the Jones Prairie avenue building. At this time the exact sum of \$416.10 was due from Reed to complainant on the Harney job, and the check was delivered to complainant by Thomas Reed in payment of the amount due on that job. At that time there was due complainant for material sold Reed and used by him on the Jones job \$241.04. The \$416.10 check was directed by Thomas Reed to be applied by complainant in settlement of the Harney job account, and a waiver of mechanic's lien on that job was given, although it is said that a waiver had been previously given; be that as it may, we attach no significance to it as affecting the rights of the parties.

We judge from the record that at the time Jones gave Thomas Reed the \$416.10 check payable to the order of complainant, there was more than that amount due to J. S. Reed for the Prairie avenue building job, so that the money represented by the check was in fact a payment on account of the indebtedness due J. S. Reed from Jones and was Reed's money, which he had a right to use in the payment of his debt to complainant on the Harney job. Consequently, Jones suffered no loss in the payment of this money to Reed.

Jones had the right to demand, as a condition of payment, a waiver of complainant's lien, but he made the payment without exacting such waiver and with at least the implied knowledge that complainant had such lien. When Jones discovered what he seems to have regarded as a mistake, he sought to have Reed adjust the matter by procuring complainant to apply so much of the \$416.10 as was necessary to the extinguishment of the claim against the Prairie avenue

was given by Jones to Reed as the result of a conversation between them as to the amounts that were then due and due to the contractors on the Jones Prairie Avenue building. At this time the exact sum of \$416.10 was due from Reed to complainant on the Barney Job, and the check was delivered to complainant by Thomas Reed in payment of the amount due of that job. At that time there was no complaint for material sold Reed and used by him on the Jones job \$241.04. The \$416.10 check was directed by Thomas Reed to be applied by complainant in settlement of the Barney Job account, and a waiver of mechanic's lien on that job was given, although it is said that a waiver had been previously given; be that as it may, we attach no significance to it as affecting the rights of the parties.

We turn from the record that at the time Jones gave Thomas Reed the \$416.10 check payable to the order of complainant, there was more than that amount due to J. S. Reed for the Prairie Avenue building job, so that the money represented by the check was in fact a payment on account of the indebtedness due J. S. Reed from Jones and was Reed's money, which he had a right to use in the payment of his debt to complainant on the Barney Job.

Subsequently, Jones suffered no loss in the payment of this money to Reed.

Jones had the right to demand, as a condition of payment, a waiver of complainant's lien, but he made the payment without exacting such waiver and with at least the implied knowledge that complainant had such lien. When Jones discovered that he seems to have regarded as a mistake, he sought to have Reed adjust the matter by presenting complainant to supply so much of the \$416.10 as was necessary to the extinguishment of the claim against the Prairie Avenue



building, which complainant declined to do.

Some point is made of the fact that complainant served a notice of lien on the Harney job subsequent to receiving the German Oil and Chemical Company check. It seems that Reed had trouble in procuring payment from Harney; that the notice served was at the request of Reed, and in an effort to help Reed make the collection, but with the distinct understanding and statement that complainant would not pursue the notice farther or consent to changing in any manner the payment from the Harney job. We do not think this action tends to change the situation of the parties.

There never was any receding by complainant from its original position that it received the check in discharge of the amount due it on the Harney job. There was no contractual relationship between complainant and Jones. Whatever claims complainant might have had against the two Joneses for material sold by it to Reed and which was inwrought into the Prairie avenue building, rested solely in rights conferred by the Mechanic's Lien statute. There was nothing in the \$416.10 check which carried with it notice to complainant of any limitation as to its application to the payment of any particular claim. When Reed received the check he did not receive it as the agent of Jones, but in payment of a debt to his son, whom he represented.

The decree of the Superior Court is affirmed.

**AFFIRMED.**



building, which complainant declined to do.

Some point is made of the fact that complainant served a notice of lien on the Harney job subsequent to receiving the Harney 11 and Chemical Company check. It seems that Reed had trouble in procuring payment from Harney; that the notice served was at the request of Reed, and in an effort to help Reed make the collection, but with the distinct understanding and statement that complainant would not pursue the notice further or consent to changing in any manner the payment from the Harney job. We do not think this action tends to change the situation of the parties.

There never was any receding by complainant from its original position that it received the check in discharge of the amount due it on the Harney job. There was no contractual relationship between complainant and Jones. Whatever claims complainant might have had against the two Joneses for material sold by it to Reed and which was introduced into the Erie Avenue building, rested solely in rights conferred by the mechanic's lien statute. There was nothing in the \$48.10 check which carried with it notice to complainant of any limitation as to its application to the payment of any particular claim. When Reed received the check he did not receive it as the agent of Jones, but in payment of a debt to his son, whom he represented.

The decree of the Superior Court is affirmed.

APPROVED.

GEORGE HOSIE,  
Appellant,

vs.

LA SALLE, a corporation,  
Appellee.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

204 I.A. 481

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff's action is for personal injuries. On a trial before court and jury he prevailed by a verdict and judgment in his favor of \$500. He prosecutes this appeal and asks for a reversal and a new trial for the sole and only reason that the award of damages is wholly insufficient.

Plaintiff's employment with defendant was that of an engineer. On the day of the accident a certain metal airduct pipe was being razed. For this job one Schmidt was the contractor, whom plaintiff was assisting in his work of demolition, and while so engaged a piece of the pipe tumbled down, hitting plaintiff on the head and creating a scalp wound. Plaintiff thereafter became, as he claims, nervous and suffered from trouble with his heart, all of which he ascribes to the accident, while there was much contrariety of testimony, medical and lay, as to whether the nervousness and heart troubles of plaintiff were attributable to the injuries sustained at the time of the accident or to a physical condition present in plaintiff before the accident.

If it shall be conceded that the defendant is liable in damages to plaintiff for the injuries sustained as a result of the accident to him while aiding in the demolition of the airduct, about which there is some doubt,

APPEAL FROM SUPREME COURT  
OF THE STATE OF TEXAS

LAURENCE, a corporation,  
Appellee,  
vs.  
Appellant,  
JAMES H. HARRIS

204144-101

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

Plaintiff's action is for personal injuries. On a trial before court and jury he prevailed by a verdict and judgment in his favor of \$300. He prosecuted this appeal and asks for a reversal and a new trial for the sole and only reason that the award of damages is wholly insufficient.

Plaintiff's employment with defendant was that of an engineer. On the day of the accident a certain section of the pipe was being raised. For this job one Schmidt was the contractor, whom plaintiff was assisting in his work of

demolition, and while so engaged a piece of the pipe tumbled down, hitting plaintiff on the head and creating a scalp wound. Plaintiff thereafter became, as he claims, nervous and suffered from trouble with his heart, all of which he ascribes to the accident, while there was much contrariness of testimony, medical and lay, as to whether the nervousness and heart troubles of plaintiff were attributable to the injuries sustained at the time of the accident or to a physical condition present in plaintiff before the accident.

It is well conceded that the defendant is liable in damages to plaintiff for the injuries sustained as a result of the accident to him while aiding in the demolition of the plant, about which there is some doubt,



the question submitted to the jury was the amount of damages to be awarded plaintiff for injuries to his health traceable to the accident in question. On this question there was much conflict in the proof. There was evidence from which, if given credit by the jury, they might have rightfully concluded that plaintiff's heart troubles were constitutional and in <sup>no</sup> way attributable to the injuries suffered as the result of the accident. We are therefore not at liberty to disturb the jury's finding, sanctioned as it was by the trial Judge, unless we can say that the verdict is manifestly contrary to the probative force of the evidence. This we are unable to do.

Plaintiff has succeeded on every point made by him in the trial court. He is simply dissatisfied with the award of damages. The question of damages was in no degree minimized or affected by either the giving or refusal to give the instructions complained about. It therefore follows that if the objections urged to these instructions were well taken, they would not constitute error which would permit of a reversal of the judgment and the awarding of a trial de novo, for we have no right to assume that the giving or eliminating of the instructions complained about would have so changed the result as to have increased the damages awarded. A judgment will not be disturbed upon review for mere inadequacy of damages awarded unless it is apparent that the verdict was the result of passion or prejudice in the jury or of errors of law by the court. These elements we do not find present in the instant case. Harper v. Black Diamond Coal Co., 142 Ill. App. 594; Hartwell v. Black, 48 Ill. 301.

There is no reversible error in this record and the judgment of the Superior Court is affirmed.

**AFFIRMED.**



the question submitted to the jury was the amount of damages to be awarded plaintiff for injuries to his health traceable to the accident in question. On this question there was much conflict in the proof. There was evidence from which, if given credit by the jury, they might have rightfully concluded that plaintiff's heart troubles were constitutional and in any event attributable to the injuries suffered as the result of the accident. We are therefore not at liberty to disturb the jury's finding, sustained as it was by the trial judge, unless we can say that the verdict is manifestly contrary to the probative force of the evidence. This we are unable to do.

Plaintiff has succeeded on every point made by him in the trial court. He is simply dissatisfied with the award of damages. The question of damages was in no degree minimized or affected by either the giving or refusal to give the instructions complained about. It therefore follows that if the objections urged to these instructions were well taken, they would not constitute error which would result in a reversal of the judgment and the awarding of a trial de novo, for we have no right to re-examine the giving or withholding of the instructions complained about until we have ascertained the result as to have increased the damages awarded. A judgment will not be disturbed upon review for mere inadequacy of damages awarded unless it is apparent that the verdict was the result of passion or prejudice in the jury or of errors of law by the court. These elements we do not find present in the instant case. Harper v. Black Island Lumber Co., 143 Ill. App. 554; Intertell v. Black, 48 Ill. 301.

There is no reversible error in this record and the judgment of the Appellate Court is affirmed.

301 - 22735

GEORGE W. MURRAY,  
Appellee,

vs.

ROBERT BURGESS et al.,  
Appellants.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

204 I.A. 482

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The turmoil of this litigation arises from the disputed pedigree of a Percheron stallion named "Dardignan." The pleadings are much involved; a full statement of them is not necessary either to an understanding or decision of the case. The common counts are a part of the declaration under which the cause proceeded to trial, as well as of a bill of particulars in which is set forth the contract, the gravamen of this action. There are also additional and amended counts, pleas, original and additional, a plea of the general issue, replications to sundry pleas and similiter as to others; likewise demurrers, general and special, to many portions of such pleadings, both written and ore tenus. There were numerous rulings of the court upon these pleadings, none of which affected the rights of the parties or limited the proofs on the merits of the cause, so that we shall neither further refer to nor discuss them.

Preliminary to our decision we will state that we are of the opinion from the evidence, that whatever confusion may have arisen in the pedigree or registry of such pedigree of the stallion "Dardignan" is chargeable to defendants, for which plaintiff is in no manner responsible or answerable. No act of his, prior or subsequent to the making of the contract hereinafter referred to, contributed to the

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

EDWARD W. MURRAY,  
Appellee,  
vs.  
ROBERT MURPHY et al.,  
Appellants.

2011.1.182

H. JUSTICE HUNTER DELIVERED THE OPINION OF THE COURT.

The record of this litigation arises from the

disputed pedigree of a Petitioner's affidavit named "Dardigman".

The pleadings are much involved; a full statement of them

is not necessary either to an understanding or decision of

the case. The common counts are a part of the decision

under which the cause proceeded to trial, as well as of a

bill of particulars in which is set forth the contract, the

statement of this action. There are also additional and

amended counts, pleas, original and additional, a plea of

the General Issue, replications to sundry pleas and answers

as to answers; likewise demurrers, general and special, to

many portions of such pleadings, some written and one large.

There were numerous rulings of the court upon these plead-

ings, none of which affected the rights of the parties or

affected the proofs on the merits of the case, so that we

shall neither further refer to nor discuss them.

Preliminary to our decision we will state that

we are of the opinion from the evidence, that whatever con-

dition may have arisen in the pedigree or registry of such

pedigree of the action "Dardigman" is chargeable to de-

fectness, for which Dardigman is in no manner responsible or

answerable. The rest of his, prior or subsequent to the making

of the contract hereinafter referred to, contributed to the



confusion on this subject which the record discloses.

In April, 1909, defendants were importers of Percheron horses, doing business at Wenona, Illinois, and plaintiff was a farmer and stock raiser at Estherville, Iowa. During that month plaintiff went to defendants' place at Wenona and purchased from them the stallion "Dardignan," which defendants had bought in France as a Percheron, they representing to plaintiff that the stallion was registered in the French stud book and also by the Percheron Society of America. With the animal plaintiff received from defendants a certificate of his pedigree issued by the Percheron Society of America and also what purported to be a certificate of his registration in France. The Iowa State Board of Agriculture refused to issue a license to stand the stallion for the season of 1912, on the ground that there were alterations and erasures in the pedigree certificate, and that the description of the stallion therein had been tampered with. It will be readily seen that the value of the animal for breeding purposes depended upon his pedigree as registered in the French stud book and the Percheron Society of America, and that, consequently, the authenticity of such registrations was of great importance to the owner of the animal. There is much testimony as to the difficulties encountered in this regard, but we think they are of but little moment in this controversy, because in settlement of such controversies the contract in suit was entered into. The contract, the material portions of which we recite, is dated March 13, 1912, and executed by plaintiff and defendants. It commences:

"Whereas, about April 10, 1909, George Murray of Estherville, Iowa, purchased from Robt. Burgess & Son of Wenona, Illinois, through Thomas Burgess, a stallion whose name was Dardignan \* registered by the Percheron Society of America, and whereas confusion exists as to



condition on this subject which the record discloses.

In April, 1909, defendants were importers of Percheron horses, doing business at Genoa, Illinois, and plaintiff was a farmer and stock raiser at Eastonville, Iowa. During that month plaintiff went to defendants' place at Genoa and purchased from them the stallion "Dardian", which defendants had bought in France as a Percheron, they representing to plaintiff that the stallion was registered in the French stud book and also by the Percheron Society of America. With the animal plaintiff received from defendants a certificate of his pedigree issued by the Percheron Society of America and also what purported to be a certificate of his registration in France. The Iowa State Board of Agriculture refused to issue a license to stand the stallion for the season of 1912, on the ground that there were alterations and errors in the pedigree certificate, and that the description of the stallion therein had been tampered with. It will be readily seen that the value of the animal for breeding purposes depended upon his pedigree as registered in the French stud book and the Percheron Society of America, and that, consequently, the authenticity of such registrations was of great importance to the owner of the animal. There is much testimony as to the difficulties encountered in this regard, but we think they are of but little moment in this controversy, because in settlement of such controversies the contract in suit was entered into. The contract, the material portions of which we quote, is dated March 13, 1912, and executed by plaintiff and defendants. It commences:

"Whereas, about April 10, 1909, George Murray of Eastonville, Iowa, purchased from J. B. Burgess & Son of Genoa, Illinois, through Thomas Burgess, a stallion whose name was Dardian & registered by the Percheron Society of America, and whereas condition exists as to

the description of registry and the identity of the said horse, and the said parties desire to adjust between themselves all liability for damages which may arise out of the sale, it is therefore agreed between said parties as follows:"

The contract then proceeds:

First, that said stallion is the sire of four colts, named "Dardanus", valued at \$600; "Dardignan II", valued at \$400; "Blanche", valued at \$400; "Junette" valued at \$350; all owned by George Murray; and further recites that the stallion was the sire of three other colts, viz., colt from Julia, value \$250; colt from Lena, value \$250; colt from Clematis, value \$200; all owned by Murray. Other colts not owned by Murray and not material to this suit are also mentioned.

The contract further recites:

"And now, in view of the unsettled condition of the registry record of the said stallion, it is uncertain that the registry of said stallion will be continued, or that his colts are entitled to registry or will be permitted to be registered. Now in case the said progeny of said stallion shall be denied registry, the said Robt. Burgess & Son agree to purchase from said George Murray all of his above enumerated colts at the above agreed prices at the time of refusal of registry \* and said Murray will make application for registry about June 1st, 1912, of all colts that have been foaled in the year 1911. \* \* \*"

Said contract further provides that defendants will surrender to plaintiff his note for \$1300, in favor of defendants, given for the stallion "Jumeuneuf," and that the contract shall stand as a bill of sale of said animal, the payment of which is acknowledged; that Murry will within a reasonable time bill and consign to defendants at Wenona said stallion, and that defendants will pay the freight and accept delivery at Estherville, Iowa; that "in settlement of all damages not enumerated above, and arising out of the purchase and sale of said stallion "Dardignan" sustained or that may be sustained by said Murray by reason

the description of registry and the identity of the said horse, and the said parties to the said contract shall also themselves all liability for damages which may arise out of the sale, it is therefore agreed between said parties as follows:

The contract then proceeds:

First, that said station is the site of four colts, named "Parliament", valued at \$500; "Parliament II", valued at \$450; "Blanche", valued at \$450; "Jupiter" valued at \$350; all owned by George Murray; and further that after that the station was the site of three other colts, viz., colt from this, value \$250; colt from same, value \$250; colt from Oklahoma, value \$200; all owned by Murray. Other colts not owned by Murray and not material to this suit are also mentioned.

The contract further recites:

"And now, in view of the unsettled condition of the registry record of the said station, it is uncertain that the registry of said station will be continued, or that his colts are entitled to registry or will be permitted to be registered. Now in case the said program of said station shall be ended registry, the said Mr. Burgess & son agree to purchase from said George Murray all of his above enumerated colts at the above agreed prices at the time of relief of registry and said Murray will make application for registry about June 1st, 1911, of all colts that have been foaled in the year 1911. \* \* \*

Said contract further provides that defendant will surrender to plaintiff his note for \$1000, in favor of defendant, given for the station "Jupiter", and that the contract shall stand as a bill of sale of said animal, the payment of which is acknowledged; that Murray will assign in a separate time bill and assign to defendant at Thomas said station, and that defendant will pay the freight and accept delivery at Northville, Iowa; that in settlement of all damages not compensated above, and arising out of the purchase and sale of said station "Parliament" mentioned or that may be sustained by said Murray by reason



of the defect in registry, expense, or any other cause, the said Robt. Burgess & Son have this day paid said Murray the sum of \$350.00, the receipt of which is hereby acknowledged"; and concludes with an agreement on the part of plaintiff that he will not make or file any complaint with the Percheron Society of America or its officers regarding any confusion in the registry, etc., of said stallion, and that he will render all assistance in his means or power friendly or favorable to defendants in connection with all matters in the contract.

The damages awarded by the jury, \$2650, and for which sum the court gave judgment, are those suffered by plaintiff by reason of the failure of defendants to perform the contract on their part for the purchase of the colts owned by plaintiff and in the contract mentioned.

The Percheron Society, on application made by plaintiff, refused registry of these colts, and at the same time revoked the registry of Dardignen's colts subsequent to April 10, 1909.

The colts were in apt time tendered by plaintiff to defendants, who refused to take them.

Among the errors assigned and urged in argument for reversal are, that the contract was unilateral, that it was a gambling contract, that the court erred in its rulings on the evidence and on the instructions to the jury, and that the verdict is contrary to the weight of the evidence.

The contract was entered into, as appears from its recitals, in settlement of disputes then existing between the parties, which settlement was a sufficient consideration to support the contract. The contract is not unilateral because both parties to it are charged with duties and obligations thereunder. It is a purchase and





sale contract made in settlement of disputes between the parties. The \$350 payment by defendants to plaintiff was made pursuant to the contract. The stallion "Dardignan" was sent by plaintiff to defendants and received by them, as provided in the contract. Plaintiff's \$1300 note, which defendants held for purchase price of the stallion "Jumeun-euf," was surrendered to plaintiff in accord with the stipulation of the contract in that regard. The parties by their conduct have established the bilateralness of the contract insofar as the same has been voluntarily performed by them. This is, we think, too patent to be of doubt.

In what respect the contract is a gambling contract we are unable to perceive. Some matters, which in the natural course of events might happen, are anticipated by the contract. The fact that such future happenings were anticipated can in no way be held to stigmatize the contract as a gambling contract.

There is no evidence in the record that plaintiff violated the contract by filing complaints with the Percheron Society of America or its officers, or that he did anything which caused the Society to refuse to register the colts. Neither can we say that plaintiff is liable in any way for the action of the Society in refusing registration, or for violation of its by-laws, if it did violate them. By the contract ~~as~~ the parties relied, as they necessarily must, upon the bona fides of the action of the Society in registering or refusing to register the colts. If any mala fides were proven against the Society in their refusal to register any of the colts, such conduct is not chargeable to plaintiff.

the contract made in settlement of disputes between the parties. The first payment by defendant to plaintiff was made pursuant to the contract. The station "Lambert" was sent by plaintiff to defendant and received by them, as provided in the contract. Plaintiff's \$1000 note, which defendant paid for purchase price of the station "Lambert", was surrendered to plaintiff in accord with the stipulation of the contract in that regard. The parties by their conduct have established the falsity of the contract insofar as it was not voluntarily entered into by them. This is, we think, too patent to be of doubt.

In what respect the contract is a gambling contract we are unable to perceive. Some matters, which in the natural course of events might happen, are noticed by the contract. The fact that such future happenings were anticipated can in no way be held to establish the contract as a gambling contract.

There is no evidence in the record that plaintiff violated the contract by filing complaints with the Berenson Society of Justice or its officers, or that he did anything which caused the Society to refuse to register the note. Neither can we say that plaintiff is liable in any way for the action of the Society in refusing registration, or for violation of its by-laws, if it did violate them. By the contract the parties agreed, as they necessarily must, upon the legal effect of the action of the Society in refusing to register the note. It may well be that the Society is not a charitable organization, and that its action is not charitable, but that is not the issue. The issue is whether the contract is a gambling contract, and whether it is enforceable. If it is not enforceable, then the contract is void, and the parties are not bound by it.



The verdict and judgment are supported by the proofs, and the measure of damages, whether erroneous or not, conforms to the measure of damages which defendants laid down in an instruction which they requested the court to give and which the court did give to the jury. In Brennen v. Chicago and Carterville Coal Co., 241 Ill., 610, it was held that a party will not be permitted on appeal to complain of an error in his opponent's instruction where his own instruction contains the same error. More than sixty instructions were proffered to the trial Judge by both sides - an unnecessary and inexcusable number. More than fifty of these instructions were proffered by defendants. If defendants' instructions had all been given, the jury would have been confused and not enlightened in applying to the evidential facts the multifarious propositions of law therein appearing. We are of the opinion that the instructions given by the learned trial Judge, culled, presumably, from this large number as best he could during the closing arguments of counsel in the case, sufficiently instructed the jury upon every proposition material and necessary to be applied to the facts before them. When a jury is sufficiently instructed on the law of the case, it is not error to refuse other instructions, even though they may state correct propositions of law which might be applied to the facts in proof.

There was no reversible error in procedure at the trial.

This appeal is without merit, and the judgment of the Circuit Court is affirmed.

AFFIRMED.



The verdict and judgment were supported by the  
prosecution, and the testimony of the witnesses, and the  
not, contains no statement of the evidence which the  
jury was to consider in the trial. It is not  
to give and which the court did give to the jury. In  
People v. Wilson and Lattimore, 141 Ill. 2d, 1901,  
it was held that a party will not be permitted to appeal to  
the court to set aside the verdict of the jury on the ground  
that the jury was misled by the instructions given to them.  
The court in that case held that the instructions given to the  
jury were correct and that the jury was not misled by them.  
It is not error to refuse to give other instructions, even though  
they may state correct propositions of law which would be  
applied to the facts in the case.  
There was no reversible error in the verdict of the jury.  
The verdict is affirmed.  
The court is without jurisdiction to set aside the verdict of the jury.  
The court is without jurisdiction to set aside the verdict of the jury.

315 - 22749.

204 I.A. 484

JAKE FALKIN,  
Appellee,

APPEAL,

vs.

MUNICIPAL COURT

SAMUEL KUNIN,  
Appellant.

OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for possession of certain premises in Chicago in a forcible detainer action. While the trial was by jury, the court instructed the verdict, upon which judgment was entered against defendant, and he appeals in an effort to reverse that judgment.

Defendant was a tenant of the store in question owned by Charlotte Kompel, who, by a lease dated July 1, 1916, demised the premises to the plaintiff, for a term of three years and two months. Defendant at the time of the making of this lease was in possession of the premises demised, and therefore had some negotiations with his lessor for an extension of his lease. Defendant paid rent for May, June and July, 1916. On the 20th day of June, 1916, Charlotte Kompel, the lessor, gave defendant a notice terminating the tenancy on July 31st thereafter and requiring him to surrender possession on that date. The defense is an agreement for another term. As stated by defendant and two of his witnesses, the lease was to be for a term of one, two or three years at a rental of \$50 per month with a promise on the part of the lessor to make a written lease.

From the evidence it cannot be said that the minds of the parties met upon a new lease. The promise of a lease,

2041A.484

718 - 22749

JAMES LARKIN, Appellee,  
vs.  
MARSHALL LARKIN, Appellant.

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for possession of certain premises in Chicago in a forcible detainer action. While the trial was by jury, the court instructed the verdict, upon which judgment was entered against defendant, and he appeals in an effort to reverse that judgment. Defendant was a tenant of the store in question owned by Charlotte Koppel, who, by a lease dated July 1, 1918, leased the premises to the plaintiff, for a term of three years and two months. Defendant at the time of the making of this lease was in possession of the premises leased, and therefore had some negotiations with the lessor for an extension of his lease. Defendant paid rent for May, June and July, 1918. On the 20th day of June, 1918, Charlotte Koppel, the lessor, gave defendant a notice terminating the tenancy on July 31st thereafter and requiring him to surrender possession of that date. The defense is an agreement for another term. He stated by defendant and two of his witnesses, the lease was to be for a term of one, two or three years at a rental of \$50 per month with a provision on the part of the lessor to make a written lease. From the evidence it cannot be said that the plaintiff of the parties was upon a new lease. The promise of a lease,

2.

if made, was broken, but the promise did not constitute a lease nor entitle defendant to hold over, and if he did hold over he became a tenant from month to month, requiring a thirty day notice to terminate his tenancy. This notice was given. The lessor, having by lease granted the right of possession to plaintiff, was the proper party to maintain the forcible detainer action. Gazzolo v. Chambers, 73 Ill. 75.

When the landlord had rightfully terminated the tenancy by notice, it was unnecessary to give any further notice as a sine que non to the right to commence an action for possession. Condon v. Brockway, 157 Ill. 90.

It is the law that where a tenant holds over for a year or for years after the term expires, without any new agreement, the landlord may at his election treat such tenant as a trespasser or as a tenant for another year upon the same terms as in the original lease. But no such right of election belongs to the tenant. Clinton Wire Cloth Co. v. Gardner, 99 *ibid* 151; Keegan v. Kinnare, 123 *ibid* 280. Under the statute, a demand for possession before bringing an action of forcible detainer against a tenant holding over is not necessary.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



it must, was broken, but the provision did not constitute a  
lease nor entitle defendant to hold over, and it is his  
hold over he became a tenant from month to month, requiring  
a thirty day notice to terminate his tenancy. This notice  
was given. The lessor, having by lease created the right  
of possession to plaintiff, was the proper party to maintain  
the forcible detainer action. Quasoli v. Campbell, 15  
Ill. 75.

When the landlord had rightfully terminated the  
tenancy by notice, it was unnecessary to give any further  
notice as a statute gave him the right to commence an action  
for possession. Gordon v. Brown, 157 Ill. 50.  
It is the law that where a tenant holds over for  
a year or for years after the term expires, without any new  
agreement, the landlord may at his election treat such  
tenant as a trespasser or as a tenant for another term upon  
the same terms as in the original lease. For an action  
of detainer belongs to the tenant. Winnicki v. Co. v.  
Farmer, 99 Ill. 181; Farmer v. Farmer, 157 Ill. 50.

Under the statute, a tenant for possession before bringing  
an action of forcible detainer against a tenant holding  
over is not necessary.  
The remedy of the landlord is by a writ of  
ejectment.

MARY SNECKPEPER,  
Appellant,

vs.

CHICAGO RAILWAYS COMPANY,  
a corporation, and ERWIN  
C. HAGERMAN,  
Appellees.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

204 I.A. 485

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a personal injury action for the recovery of damages suffered by plaintiff when she was struck by an automobile owned by defendant Hagerman and at the time driven by his servant.

At the conclusion of the proofs of plaintiff the court, on the motion of defendants, instructed a verdict in favor of both defendants, upon which judgment was entered casting plaintiff in the costs of the cause, and she appeals, asking a reversal and a new trial.

The defendant, the Chicago Railways Company, pleaded specially that it was not the owner of the car which struck plaintiff. This was a denial of the averment in the declaration that the company owned the car, making it necessary for plaintiff, in order to succeed as to it, to prove the averred fact of the company's ownership. This she failed to do, so that the directed verdict as to the company was without error.

While we do not intend to express any opinion upon the weight or probative force of the evidence against the defendant Hagerman, still, uncontradicted, it was sufficient to support a verdict if the jury had found in plaintiff's favor. In other words, the case made by plaintiff's

NOTICE TO APPEAR  
IN COURT

WILLIAM WOODWARD,  
Appellant,  
vs.  
CHICAGO RAILWAY COMPANY,  
Respondent,  
C. H. WOODWARD,  
Appellee.

3041A.185

MR. JUSTICE HILSON DELIVERED THE OPINION OF THE COURT.

This is a personal injury action for the recovery of damages suffered by plaintiff when she was struck by an automobile owned by defendant respondent and at the time driven by his servant.

At the conclusion of the proofs of plaintiff the court, on the motion of defendant, instructed a verdict in favor of both defendants, upon which judgment was entered creating plaintiff in the case of the cause, and the appeals, setting a reversal and a new trial.

The defendant, the Chicago Railway Company, pleaded specially that it was not the owner of the car which struck plaintiff. This was a denial of the statement in the declaration that the company owned the car, making it necessary for plaintiff, in order to succeed as it is, to prove the averred fact of the company's ownership. This she failed to do, so that the directed verdict as to the company was without error.

While we do not intend to express any opinion upon the weight or probative force of the evidence against the defendant respondent, still, uncontradicted, it was sufficient to support a verdict if the jury had found in plaintiff's favor. In other words, the case ends by plaintiff's

proofs constituted, uncontradicted, a prima facie case entitling her to a verdict and the assessment of some damages. Among other matters calling for determination by the jury, was the rate of speed at which the automobile was being driven when the accident happened, and also whether such speed was excessive, the place and environment considered, so that negligence, if the speed was excessive, was attributable to defendant Hagerman. It was decided in Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, that in passing upon a motion for a directed verdict against a plaintiff, the court looks to the evidence most favorable to the plaintiff's claim; that the naked question raised for the court's consideration is whether there is any evidence fairly tending to support the plaintiff's cause of action, and that if there is, the jury must decide the case and not the court.

Should plaintiff so desire and move the court to do so, leave will be granted to amend the pleadings to conform to the present condition of the suit as to parties.

For the reasons above given the judgment of the Circuit Court as to the defendant Chicago Railways Company is affirmed, and as to the defendant Hagerman the judgment is reversed and the cause remanded for a new trial.

AFFIRMED AS TO CHICAGO RAILWAYS COMPANY  
AND REVERSED AND REMANDED FOR A NEW TRIAL  
AS TO HAGERMAN.



grossly constituted, uneducated, a white female was residing  
her as a vessel and her management at some distance. During  
other affairs relating to the defendant, the law  
rate of value at which the defendant was being living was  
the defendant's property, but also whether such goods were ex-  
cessive, the place and environment considered, so that negli-  
gence. If the goods were excessive, was attributable to the  
defendant's negligence. It was decided in Smith v. Jones (1881)  
that the defendant was liable for the goods lost for a li-  
tigated variety against a plaintiff. The goods were to the  
defendant most favorable to the plaintiff's claim; that the  
negligence was liable for the goods' destruction is  
whether there is any evidence fairly leading to suppose the  
plaintiff's cause of action, and that it looks as if the law  
must favor the case and not the goods.

Would plaintiff be liable and how the goods  
to be so, there will be found in many the defendant is  
known to the present condition of the will be to deliver.  
For the reasons above given the judgment of the  
court is that as the defendant's liability is  
is affirmed, and as to the defendant's liability the judgment  
is reversed and the cause remanded for a new trial.

APPEALS TO THE CHIEF JUSTICE OF THE SUPREME COURT  
AND REVEREND AND EMINENT THE A NEW TRIAL  
AS TO HARRIS.

WILLIAM KRUG & SON CO.,  
a corporation,  
Appellee,

vs.

CHARLES JOHNSON et al.,  
Appellants.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 487

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Appellants have made motions regarding the transcript of the record in this cause, and we are asked to restore the record to its original condition when filed in the office of the clerk of this court.

Counsel for appellee has taken unwarranted and illegal liberties with the transcript. This he unblushingly admits. Such interference with and changing of a transcript of the record this court will not tolerate. The records are sacred. No one has any right to change such a transcript of the record without permission of the court first had and obtained.

The extent of the changing of the transcript is in dispute. That the transcript has been changed in many particulars is apparent, and many of such changes are admitted by counsel for appellee to have been made by him without the authority of this court. We cannot and will not go through this transcript and restore it to its original condition, as that would be imposing upon the court a task which it should not and will not assume. Such task if assumed could not, with the conflicting contentions of counsel before us, be accurately performed.

MUNICIPAL COURT  
OF CHICAGO.

WILLIAM KNUX & SON CO.,  
Appellees,  
vs.  
WILLIAM JOHNSON et al.,  
Appellants.

MR. JUSTICE HOBBS delivered the opinion of the court.

Appellants have made motions regarding the transcript of the record in this cause, and we are asked to restore the record to its original condition when filed in the office of the clerk of this court.

Counsel for appellee has taken unwarranted and illegal liberties with the transcript. This he unhesitatingly admits. Such interference with and changing of a transcript of the record this court will not tolerate. The records are sacred. No one has any right to change such a transcript of the record without permission of the court first had and obtained.

The extent of the changing of the transcript is in dispute. That the transcript has been changed in many particulars is apparent, and many of such changes are admitted by counsel for appellee to have been made by him without the authority of this court. We cannot and will not go through this transcript and restore it to its original condition, as that would be imposing upon the court a task which it should not and will not assume. Such task if assumed could not, with the conflicting contents of counsel before us, be accurately performed.

The counsel who changed the transcript was guilty of a contempt of this court in so doing, for which we refrain, with much restraint, from disciplining him.

As we cannot from the transcript in its present condition know the truth of the record, and as appellee is chargeable with the difficulties confronting us in this regard, appellee will not be allowed to advantage of the judgment in its favor. By the action of counsel for appellee, the whole record is discredited. We will therefore relegate the parties to a retrial of the cause, after which the dissatisfied party may have a review, if he wishes, upon an unexpurgated record which imports verity.

For the reasons assigned, the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.



The counsel who brought the transcript was guilty of a conspiracy of this sort in so doing, for which we regret, with much regret, from disciplining him.

As we cannot keep the transcript in its present condition from the truth of the record, and as appeal is characterizable with the difficulties confronting us in this regard, appeal will not be allowed to advance of the

judgment in its favor. By the action of counsel for appellee, the whole record is discarded. He will therefore relegate the parties to a retrial of the case, after which the dissatisfied party may have a review, if he wishes, upon an unexpected record of a different variety.

For the reasons assigned, the judgment of the judicial court is reversed and the cause remanded for a new trial.

REVEREND AND HONORABLE.

439 - 21837

MAURICE RIORDAN,

Appellee,

APPEAL FROM

vs.

SUPERIOR COURT,

COOK COUNTY.

THOMPSON - STARRETT COMPANY,

Appellant.

204 I.A. 488

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Maurice Riordan brought suit against the Thompson-Starrett Company to recover damages for personal injuries. There was a judgment in favor of the plaintiff for \$4,000, to reverse which defendant prosecutes this appeal.

The defendant first contends that its motion in arrest of judgment should have been sustained, for the reason that the declaration does not state a cause of action. It is argued that the allegations of each of the counts of the declaration are but conclusions of law, and that no facts are averred which give rise to a duty owing from the defendant to the plaintiff. It will be unnecessary to analyze the three counts, for if one is found to be good, that is sufficient. Sec. 78, Chap. 110, R. S. The second count avers, inter alia, that the defendant was a building contractor and had a contract for the erection of a large office building; that the defendant was in charge and control of the building and had the right of access to all parts thereof; that it had entered into several contracts with sub-contractors; that the defendant and sub-contractors had employed a

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large number of men in the prosecution of the work; that it was necessary that stairways and landings should be provided for the use of the employes of the defendant and sub-contractors in walking up and down between the different floors; that the defendant provided such stairways and landings; that one of the stairways was situated at a place where it was dark; that it was the duty of the defendant to see that there was sufficient light to enable the employes to pass up and down the stairways; that it was also the defendant's duty to provide and maintain a hand railing along the outer side of the stairways to prevent employes from falling off; that the defendant neglected to light one of the stairways and construct such hand railing; that plaintiff was employed by one of the sub-contractors and "that at the time and place aforesaid it became necessary and was proper for him, in the discharge of his duty as such employe of said sub-contractor, to use said stairway, or landing, in traveling between two of the floors of said building, and he alleges that while he was so using said stairway or landing," he fell off and was injured.

Complaint is made that no fact is averred in this count from which it appears that the defendant owed plaintiff any duty at the time plaintiff was injured; that the averment that "it became necessary and was proper for him, in the discharge of his duty as such employee of said sub-contractor, to use said stairway," is but a conclusion and not an averment of fact, and for aught that appears plaintiff may have been "merely wandering around the building pursuant to his own whim or pleasure or curiosity." The allegation that at the time of the accident plaintiff was necessarily using the stairway in the discharge of his



large number of men in the possession of the land; that  
it was necessary that railways and landings should be  
provided for the use of the employees of the Government  
and not-confederate in waiting up and down between the  
different places; that the Government provided such equip-  
ment and language; that one of the railways was situated  
at a place where it was dark; that it was the duty of the  
Government to see that there was sufficient light to en-  
able the employee to pass up and down the railway; that  
it was also the Government's duty to provide and maintain  
a road running along the outer side of the railway to  
prevent employee from falling off; that the Government  
provided in light one of the railways and connected them  
with the railway; that plaintiff was employed by one of the  
employees and that at the time and place aforesaid it  
became necessary and was proper for him, in the language  
of his ship as such employee of said Government, to use  
said railway, or landing, in traveling between two of the  
places of said building, and he slipped there while he was  
so using said railway or landing, he fell off and was  
injured.

Defendant in some cases has been in error in  
this regard it was held in opinion that the defendant owed  
plaintiff not only at the time plaintiff was injured; that  
the statement that "it became necessary and was proper for  
him, in the language of his ship as such employee of said  
Government, to use said railway," is not a conclusion  
and not an averment of fact, and yet such fact appears  
plaintiff has been seen twice crossing between the build-  
ing and defendant he has not been in presence of defendant.  
The statement that at the time at the accident plaintiff  
was necessarily using the railway in the absence of the

duty as employe of the sub-contractor is not a conclusion, but a sufficient allegation of fact. The further allegation that the defendant undertook to provide and did provide stairways for the use of the men, and to see that they were properly lighted, but that it failed in this respect, does allege facts which give rise to a duty owing from the defendant to the plaintiff. And while the count may have been challenged by demurrer, yet as this was not done, the allegations are certainly sufficient on a motion in arrest of judgment. O'Rourke v. Sproul, 241 Ill. 576.

Furthermore, the defect, if any, in this regard is cured by verdict. In Paden v. C. R. I. & P. Ry. Co., 276 Ill. 63, the court said (p.65): "It has always been held that there are essentials to a recovery by the plaintiff which, though omitted from the averments of the declaration, will not render it insufficient to support a judgment. The rule stated in Chitty on Pleading (vol. 1, 673) and quoted in numerous decisions of this court is: "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict.'" "





The defendant further contends that the court erred in overruling its motion made at the close of all the evidence to direct a verdict of not guilty, for the reason (1) that plaintiff was guilty of contributory negligence; (2) that he assumed the risk; (3) that as the building, stairway and railing were under course of construction, and undergoing constant change, the defendant owed no duty to the plaintiff to furnish him a safe place in which to do his work; (4) the stairway at the time of the accident was under the control of an independent contractor.

First: The defendant contends that the plaintiff was guilty of contributory negligence, and was therefore not entitled to recover, for the reason that he was perfectly familiar with the surroundings of the place where he was injured; that he had gone up and down the same stairway prior to the accident.

It appears from the evidence that the defendant was a general contractor and had the contract for constructing the Insurance Exchange Building, a large office building in Chicago, covering about one-half of a block; and was approximately twenty stories in height; that there were four stairways located near the four corners of the building, which the defendant provided for the men employed by it and the various sub-contractors to pass from floor to floor; that the building was under roof and nearly completed, the four permanent stairways being completed from the top down to the third floor; that the stairway where plaintiff was injured was located near the southeast corner of the building; that the defendant some time prior to the accident had constructed at this place a temporary stairway





to about the third floor which was for the use of the men in passing up and down; that the Flour City Iron Company had the contract for constructing the permanent stairways; that some time prior to the accident the temporary stairway where the accident occurred was removed by the defendant, and the Flour City Iron Company proceeded to construct the permanent stairway, and had substantially completed it, except the hand railing; that in going up this stairway, the plaintiff fell off and was injured.

The accident occurred in the evening when the stairway was dark. The evidence further tends to show that the Flour City Iron Company had constructed the stairway as above mentioned, and it was necessary for another sub-contractor to build a wall at the side of the stairway where plaintiff fell before the hand railing could be placed in position, and that in the meantime the stairway was being used by the employees of the defendant and the several sub-contractors in passing from floor to floor, several hundred men going up and down it daily; that the plaintiff had used the stairway twice the day previous to and once before on the day of the accident.

The defendant argues that as the plaintiff knew the condition of the stairway, and testified that just as he was going up the stairs prior to the accident, there was only a little light on the first floor; that some of the men coming down were striking matches so they could see; that this together with other evidence clearly shows that he was guilty of contributory negligence. In support of this contention the defendant cites the cases of E. St. Louis Ice and Cold Storage Co. v. Crow, 155 Ill. 74;

-2-

to about the third floor which was for the use of the men  
is located on the east; that the third city floor  
and the basement for constructing the permanent structure;  
that some time after the building was completed the  
men where the building occupied was covered by the defendant,  
and the third city floor company proceeded to construct the  
permanent structure, and was substantially completed it,  
around the third floor; that in going up this structure,  
the defendant fell off and was injured.

The accident occurred in the evening when the  
building was dark. The defendant further states in some  
times the third city floor company had constructed the  
basement as above mentioned, and it was necessary for  
another sub-contractor to build a wall at the side of  
the structure which defendant fell before the wall falling  
would be placed in position, and that in the meantime the  
defendant was being used by the employee of the defendant  
and the general sub-contractor in passing from floor  
to floor, several parties were going up and down it daily;  
that the defendant had used the structure before the day  
previous to the day before the day of the accident.

The defendant further states at the time of the  
the condition of the structure, and testified that just  
as he was going on the stairs prior to the accident, there  
was only a little light on the third floor; that when he  
was on the stairs there were striking evidence as they would  
see; that this structure with other evidence clearly shows  
that he was going on the stairs negligently. In support  
of this testimony the defendant offers the names of J. H.  
Lewis and John Thomas as J. H. Lewis, J. H. Thomas;



Browne v. Siegel-Cooper Co., 191 Ill. 226; De Vincenzo v. Chicago Railways Co., No. 21020, Appellate Ct., First Dist.; Piepho v. Merchants Loan & Trust Co., 168 Ill. App. 511.

In the Grow case plaintiff was injured by stepping into a large hole in the floor of a barge while unloading it. There the hole was clearly apparent, the plaintiff knew it was there and could see it.

In the Siegel-Cooper case, the deceased undertook to board an elevator for the purpose of going from one floor to another. The entrance to the elevator was dark and the door was open. The deceased stepped into the shaft, fell and was injured.

In the Piepho case, plaintiff was working for a sub-contractor in the reconstruction of a building. There was a hole in one of the floors into which the plaintiff fell. He had previously passed around the same, knew it was there, and it was plainly visible.

In each of these cases it clearly appears that if the injured person attempted to step into the hole or elevator shaft, injury would inevitably result, while in the case at bar the stairway could be safely used and had been used by hundreds of men without an accident.

In Devine v. Nat. Safe Deposit Co., 240 Ill. 369, the deceased, an employe, was unloading some merchandise onto a platform. There was an opening in the platform into which he fell and was killed. The accident occurred in the day time and the opening was in plain view. It was there contended that the court should have peremptorily



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In the Simso case, plaintiff was awarded for a

In each of these cases it clearly appears that

IN RE: THE ESTATE OF JAMES H. HARRIS, JR., DECEASED.

and there concluded that the audit should have been performed in the day time and the opening was in plain view. It later was in the fall and was killed. The accident occurred near a highway. There was an opening in the distance the distance, an eye, and surrounding area immediately

instructed the jury to find for the defendant. The court in passing upon the contention said (p.374): "It cannot be said, as a matter of law, that Daly was not in the exercise of due care for his personal safety when he received the injuries, merely because he made use of the platform with full and complete knowledge of the danger." (citing cases.)

In the case at bar, whether plaintiff at and prior to the time of the injury was in the exercise of ordinary care for his own safety, was a question of fact for the jury. Ordinary care is defined in the instructions to be that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. The evidence shows that several hundred men were daily using the stairway in question, and this evidence was competent, together with all the other facts and circumstances in the case to be considered by the jury in determining whether the plaintiff was in the exercise of ordinary care for his own safety at the time of the accident. Grand Trunk Ry. Co. v. Ives, 144 U.S. 409.

Second: Defendant argues that "plaintiff had knowledge of the danger or by the exercise of ordinary care would have had knowledge of the danger to which he was subjected in going up the stairway in the dark, there being no railing," and that "he assumed all risk incident to such danger, not as a matter of contract, but upon his knowledge of the existence of the danger and voluntarily exposing himself to it." It has been repeatedly held that the doctrine of assumed risk is only applicable to a case where the relationship of master and servant exists. Shoninger

instructed the jury to find for the defendant. The court  
in passing upon the evidence said (p. 104): "It cannot  
be said, as a matter of law, that only was not in the  
case of the case for the personal injury which he received  
the instant, merely because he was not one of the persons  
with full and complete knowledge of the subject." (other  
cases.)

In the case at bar, whether plaintiff is  
entitled to the recovery of the injury was in the exercise of  
discretionary power for his own safety, was a question of fact  
for the jury. Ordinarily there is nothing in the facts  
to be that degree of care which an ordinarily prudent per-  
son would exercise under the same or similar circumstances.  
The evidence shows that several hundred men were daily using  
the stairs in question, and that evidence was competent,  
together with all the other facts and circumstances in the  
case to be considered by the jury in determining whether the  
plaintiff was in the exercise of ordinary care for his own safety  
at the time of the accident. Grand Jurors vs. Co. v. L.  
104 U.S. 482.

Reasons: Defendant argues that "plaintiff had  
knowledge of the danger or by the exercise of ordinary  
care would have had knowledge of the danger so that he  
was negligent in going up the stairs in the dark, there  
being no railing," and that "the accident was also imminent  
in such danger, not as a matter of course, but upon  
the knowledge of the existence of the danger and voluntarily  
exposing himself to it." It has been repeatedly held that  
the doctrine of common law is only applicable as a rule  
where the relationship of master and servant exists. Investment



v. Mann, 219 Ill. 242; Weifenbach v. White City Construction Co., No. 21407, Appellate Ct., First Dist. The defendant's argument is "merely an attempt to apply the doctrine of assumed risk and to give it another name." Devine v. Nat. Safe Deposit Co., supra.

Third: That the defendant owed no duty to maintain the stairway in a reasonably safe condition, for the reason that the stairway was in course of construction at the time, and that the rule requiring the defendant to furnish the plaintiff with a reasonably safe place to do his work does not apply, where the condition was changing from time to time in the prosecution of the work. The rule as contended for is undoubtedly well established, but has no application to the facts in this case. The evidence touching the question as to whether the stairway, at the time of the accident, had been completed, except as to the hand railing, is somewhat conflicting. A witness testified that work was being performed on the stairway at the time of the accident. Other witnesses testified that work had been completed three or four days prior to the accident. This question under proper instructions was left to the jury.

Fourth: That the stairway at and prior to the time of the accident was under the control of the Flour City Iron Company, and independent contractor, and therefore the defendant was not responsible for the injury sustained. On this proposition the jury were fully instructed that if the stairway at the time of the accident was under the control of the Flour City Iron Company, the defendant was not liable. The instruction was offered by the defendant and the jury by their verdict have determined the facts against it.





The defendant next contends that the evidence does not establish the cause of action charged in any count of the declaration, in that it is averred that prior to the accident, the defendant constructed and maintained the stairway in question, which it provided for the use of the men employed by it and the sub-contractors, and permitted the stairway to remain in an unsafe and dangerous condition, in failing to construct a hand railing. It is argued that these averments charged that the defendant erected the particular stairway in question without a railing for the use of the men, while the evidence establishes the fact that the defendant did not erect such stairway, but that it was erected by the Flour City Iron Company, and that this constitutes a variance. This point was not made in the trial court, and of course cannot be urged here. Furthermore we think the point is not well taken. It is alleged that the defendant provided the stairway in question for the use of the men, but that it was not properly guarded. The evidence tends to establish this averment, and is therefore sufficient to charge the defendant with liability, although the averment that the defendant had constructed the stairway was not sustained by the evidence.

The defendant further contends that the court erred in permitting the plaintiff to prove a custom tending to show that the general contractor and not the sub-contractor erected railings on temporary and permanent stairways which had been erected by subcontractors, and which were being used by the employees. Several witnesses testified to such custom, and it is argued that this custom in

The defendant here contends that the witness does not establish the cause of action charged in any count of the complaint, in that it is averred that before the accident, the defendant contracted and maintained the stairway in question, which is provided for the use of the employees by it and the sub-contractors, and permitted the stairway to remain in an unsafe and dangerous condition, in failed to construct a hand railing. It is argued that these averments charged that the defendant created the particular stairway in question through a failure for the use of the stair, while the evidence establishes the fact that the defendant did not erect such stairway, but that it was erected by the Union City Iron Company, and that this constituted a variance. This point was not made in the trial court, and of course cannot be urged here. Furthermore we think the point is not well taken. It is alleged that the defendant provided the stairway in question for the use of the men, but that it was not properly guarded. The evidence tends to establish this averment, and is therefore sufficient to sustain the defendant with liability, although the averment that the defendant had constructed the stairway was sustained by the evidence.

The defendant further contends that the count stated in paragraph one of the complaint is not well founded to state that the general contractor and not the sub-contractor erected the stairway on temporary and dangerous scaffolding which had been erected by subcontractors, and that some person used by the employee, without witness being first to such extent, and it is argued that this action in



so far as it related to temporary stairways had no bearing on the case, as the evidence showed that the temporary stairway constructed by the defendant had proper railings; that it was torn down prior to the accident, and therefore the temporary stairways had nothing to do with plaintiff's being injured; that this evidence was prejudicial, in that it eliminated the defense that the stairway at the time of the accident was in course of construction by an independent contractor who was engaged to build the stairway and railings; that no count of the declaration proceeds on such theory; that the defendant could not be held liable by reason of any custom, for the reason that it had a specific contract with the Flour City Iron Company to construct this stairway and railing. Whether this evidence was properly admitted is immaterial, for it clearly appears from the testimony of the defendant's general superintendent defendant's witness that in this particular case the stairway was turned over to the defendant by the Flour City Iron Company, after the latter company had completed its work, except as to the railing, and that it then became the duty of the defendant to properly safeguard such stairway. The question therefore was whether this stairway at the time of the accident which was being used by the employees of the defendant and the several sub-contractors had been turned over by the Flour City Iron Company to the defendant and was open for use by the men in passing from floor to floor. The jury were instructed fully on this proposition and found against the defendant, and we are clearly of the opinion that there was ample evidence to sustain their finding in this regard.

The judgment of the Superior Court of Cook County is affirmed.





491 - 21839

EUGENIE J. CRISLER,

Appellee,

APPEAL FROM

VS.

SUPERIOR COURT,

COOK COUNTY.

CHICAGO CITY RAILWAY COMPANY,  
Appellant.

204 I.A. 491

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Eugenie J. Crisler brought suit against the Chicago City Railway Company to recover for personal injuries. From a judgment of \$2,600 entered in favor of the plaintiff by the Superior Court of Cook County, defendant prosecutes this appeal.

Plaintiff was alighting from one of defendant's street cars and was injured, her contention being that the car stopped to permit passengers to alight, and while she was in the act of alighting, the car started with a jerk and threw her to the ground. The defendant's theory was that plaintiff got off the car before it had come to a stop. Plaintiff and her sister gave testimony tending to establish plaintiff's theory; while six witnesses gave testimony tending to establish the theory contended for by the defendant.

It is urged by the defendant with much force that the evidence offered on behalf of the plaintiff as to the manner in which the accident occurred is highly improbable. As, however, we have reached the conclusion that the judgment must be reversed because of errors in

101 - 104

THOMAS J. BAKER

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CHICAGO CITY BATTERY COMPANY

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101-104

MR. THOMAS J. BAKER, CHICAGO CITY BATTERY COMPANY

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THOMAS J. BAKER, CHICAGO CITY BATTERY COMPANY

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instructions, we refrain from expressing any opinion as to the weight of the evidence, further than to say that in our opinion plaintiff's case is not so clear upon the facts that we would feel justified in holding that the errors in instructions were not prejudicial to the defendant.

At the request of the plaintiff the court gave instruction No. 10, which told the jury that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying; that in determining upon which side the preponderance of evidence is, the jury should take into consideration various matters enumerated, omitting, however, any reference to the number of witnesses testifying pro and con, and concluded, "and from all these circumstances determine upon which side is the weight or preponderance of the evidence." This instruction has repeatedly been held misleading and erroneous, and especially so in a case such as the one at bar. Larson v. Ward-Corby Co., 198 Ill. App. 109; Chicago Union Traction Co. v. Hampe, 228 Ill. 350.

Plaintiff contends that even if this instruction is erroneous the error is cured by instruction 16 given on behalf of the defendant. If this instruction was the only one complained of, we would be inclined to hold that the error was not reversible, or in any event that under the rule announced in the cases of E. J. & E. Ry. Co. v. Lawlor, 229 Ill. 621; West Chicago Street R. R. Co. v. Lieserowitz, 197 Ill. 607, and Lyons v. Chicago City Ry. Co., 258 Ill. 95, the error was cured by instruction 16.

The court also, at the request of the plaintiff, gave instructions Nos. 6, 8, 9 and 11.





Instruction No. 6 is as follows: "If the jury believe from the evidence in this case that car of the defendant company came to a stop at Wentworth avenue to let passengers alight; and if the jury further believe from the evidence in this case that Eugenie J. Grisler was a passenger on said car<sup>and</sup> while said car was at a standstill attempted with all due care and diligence to alight from said car; and if the jury further believe from the evidence in this case that while said Eugenie J. Grisler was in such act of alighting from said car said car was started by the servant of the company (if you believe said car was started), and that thereby Eugenie J. Grisler was injured in manner and form as charged in her declaration and that at the time of and just prior to said occurrence the said plaintiff was in the exercise of due and ordinary care and diligence for her own safety, then the jury should find the defendant guilty in the suit brought by Eugenie J. Grisler."

This instruction is not clear and would probably be confusing and misleading to the jury. It also attempts to enumerate facts which if proven would constitute negligence as a matter of law. It is always the better practice to have the jury determine whether the facts constitute negligence. City of Chicago v. Dinsmore, 162 Ill. 658.

Instruction No. 8 is argumentative and misleading. If it was desired that the jury be instructed as to the degree of care required of the defendant, this could be clearly stated so that it would be intelligible to the jury. This was the only instruction given on this subject, and the statement that the defendant was not an insurer of the safety of its passengers was in no way applicable to the facts, and might have tended to obscure the issue involved.

Interrogation No. 2 is as follows: "Is the jury

believe from the evidence in this case that any of the  
defendants conspired to a stop at Government Avenue for the  
purpose of killing; and if the jury believe from  
the evidence in this case that defendant A. Delmar was a  
participant in said conspiracy, was he a substantial  
participant with all the same and assistance to which they  
were entitled; and if the jury believe from the evidence  
in this case that said defendant A. Delmar was in touch  
with all the other defendants from said case and started by the  
statement of the company (if you believe said case was started),  
and that thereby defendant A. Delmar was injured in manner  
and form as charged in her declaration and that at the time  
of said jury trial he said otherwise the said plaintiff was  
in the knowledge of his own statement and his knowledge for  
her own safety, then the jury should find the defendant  
guilty in the case brought by Thomas J. Delmar."

This declaration is not clear and would probably  
be confusing and misleading to the jury. It also attempts to  
introduce facts which it never would constitute negligence  
on a matter of law. It is obvious the better practice to have  
the jury determine whether the facts constitute negligence.  
This is the proper way to handle the case.

Interrogation No. 3 is as follows: "Is the jury  
satisfied that the jury be instructed as to the  
degree of care required at the defendant, he should be found  
guilty if he would be liable to the jury. This  
was the only instruction given on this subject, and the jury  
must find the defendant was not an insurer of the safety of  
the passengers and is not responsible in the case, and  
must have failed to exercise the duty required."



By instruction No. 9 the jury were told that plaintiff was only required to make out her case by a preponderance of the evidence, and that any evidence, circumstantial or positive and direct, which tended to produce belief in the mind of the jury was proper to be considered by them in determining whether the defendant was guilty. This instruction, under the facts of this case, would be of no assistance to the jury in reaching a solution as to whether plaintiff was given sufficient time after the car had stopped to alight therefrom, or whether she attempted to alight from the car before it had stopped, which was the only questions involved. Its only effect would be to confuse the jury.

Instruction No. 11 attempted to define what elements could be considered in determining plaintiff's damages. Plaintiff concedes that this instruction is inartistically and inartificially drawn. This defect can be cured on another trial.

In People v. Csontos, 275 Ill. 407, the court said: (p.407) "The utility of instructions to juries is to advise them concerning the rules of law applicable to the facts of each case, and their efficiency depends upon the ability of the jury to make such application." We think the instructions above discussed would not be of assistance to the jury in this case, but on the contrary would tend to confuse and mislead them, and where the right to recover is doubtful, it is essential that instructions correctly state the law. Strawboard Co. v. C. & A. R. R. Co., 177 Ill. 513.



My investigation No. 2 has just been told that this-  
 left was only required to make out her name by a preliminary  
 view of the evidence, and that only evidence, circumstantial  
 or positive and direct, which seemed to require belief in  
 the guilt of the jury was proper to be considered by them  
 in determining whether the defendant was guilty. This is  
 expected, under the facts of this case, would be of no  
 assistance to the jury in reaching a conclusion as to whether  
 Plaintiff was given bullet-proof glass after the car had  
 stopped in front of the station, or whether the attempt to  
 climb from the car before it was stopped, which was the  
 only question involved. Its only effect would be to  
 confuse the jury.

Investigation No. 11 attempted to bring what  
 evidence could be considered in determining Plaintiff's  
 damages. Plaintiff contended that this question is  
 factually and legally distinct. This before and  
 he tried on another trial.

In People v. Gorman, 275 Ill. 407, the court  
 said: (p. 410) "The utility of questions to Justice is in  
 order from maintaining the power of law relative to the  
 facts of each case, and their utility depends upon the  
 utility of the jury as well as upon the utility of the  
 questions. The questions should be asked only if they tend  
 to the jury in this case, and the questions would tend to  
 confuse and mislead them, and when the right to remove  
 is refused, it is essential that reasonable doubt  
 shall be left. People v. Gorman, 275 Ill. 407, 177  
 Ill. 211.

Plaintiff, however, contends that even if the instructions were erroneous, the errors were cured by other instructions given on behalf of the defendant. We, however, are of the opinion that in view of the closeness of the case, the errors in the instructions were not cured, and the judgment of the Superior Court must be reversed and the cause remanded.

REVERSED AND REMANDED.

doi:10.1017/S0022292415000128

biochemical and molecular biology. On a very basic level, the

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...and the ...

we were disappointed but all went well. The service is the best I have ever had.

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...and the same will be the case.

PEOPLE OF THE STATE OF ILLINOIS,  
By Rufus M. Potts, etc.,

Appellee,

vs.

CONTINENTAL BENEFICIAL ASSOCIATION, et al.,

Appellants.

INTERLOCUTORY APPEAL  
FROM SUPERIOR COURT,  
COOK COUNTY.

204 I.A. 510

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

After the order was entered awarding a writ of injunction and appointing a receiver in People v. Continental Beneficial Association, et al., Gen. No. 23043, opinion filed this date, appellants filed a bill in the Circuit Court of Cook County, touching the same matters involved in that case, and asking for the appointment of an ancillary receiver of the property of appellant association. Thereupon the receiver filed a petition in the suit pending in the Superior Court praying that appellants be enjoined from prosecuting the suit in the Circuit Court, and an order was entered in accordance with the prayer of the petition, to reverse which this appeal is prosecuted.

The only ground urged for reversal of the order is that the Superior Court had no authority to appoint a receiver. As we have this day held that the appointment of the receiver by the Superior Court was proper (People v. Continental Beneficial Association, et al., supra.) that case is controlling.

The order of the Superior Court appealed from will, therefore, be affirmed.

Mr. Justice Taylor dissents.

AFFIRMED.



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THE PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. James O'Brien,

Defendant in Error,

vs.

CITY OF CHICAGO, HARMON M. CAMPBELL,  
ELTON LOWER and JOHN J. FLYNN, Civil  
Service Commissioners of the City of  
Chicago, THOMAS O'CONNOR, Fire Marshal,  
and  
MICHAEL ZIMMER, Comptroller of the City  
of Chicago,

Plaintiffs in Error,

ERROR TO

CIRCUIT COURT,  
COOK COUNTY.

204 I.A. 516

MR. JUSTICE GOODWIN delivered the opinion of the  
court.

This writ of error was sued out to reverse  
a judgment entered in the Circuit Court, directing the  
issuance of a writ of mandamus commanding the respondents  
to place the name of relator on the roster of pipemen of  
the Fire Department of the City of Chicago. An abstract  
of record was filed January 18, 1916, and when the cause  
was called January 26, 1916, it was taken on abstract  
filed and brief to be filed by the plaintiffs in error  
by February 25, 1916. Plaintiffs in error have, however,  
failed to file their brief. Rule 22 of this court pro-  
vides that:

"In case of the failure of the plaintiff in  
error or appellant to file both his abstract and  
brief within the time limited herein, the appeal  
or writ of error will be dismissed on motion and  
notice before, or without notice on the call of  
the docket, unless the delay is excused upon cir-  
cumstances to be shown by affidavit."

THE PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. James O'Brien,

Defendant in Error,

vs.

City of Chicago, Robert M. Campbell,  
Mayor, and John J. Wilson, Civil  
Service Commissioners of the City of  
Chicago, Thomas C. Connor, Fire Marshal,  
and  
Michael E. Miller, Comptroller of the City  
of Chicago,

Plaintiffs in Error.

3041A 516

THE JUDGE GRADUALLY DELIVERED THE OPINION OF THE

COURT.

THIS WRIT OF ERROR WAS GRANTED TO REVERSE

A JUDGMENT ENTERED IN THE CIRCUIT COURT, DISMISSING THE

COMPLAINT OF A SUIT OF MARRIAGE CONCERNING THE RESPONDENTS

TO PLACE THE NAME OF THE RESPONDENT IN THE REGISTER OF

THE CITY DEPARTMENT OF THE CITY OF CHICAGO. AN ABSTRACT

OF RECORD WAS FILED JANUARY 18, 1916, AND WHEN THE CASE

WAS CALLED JANUARY 25, 1916, IT WAS TAKEN ON ABSTRACT

FILED AND TRIED TO BE FILED BY THE PLAINTIFFS IN ERROR

BY FEBRUARY 25, 1916. PLAINTIFFS IN ERROR HAVE, HOWEVER,

FAILED TO FILE THEIR WRIT. RULE 32 OF THIS COURT PRO-

VIDES THAT:

"IN CASE OF THE FAILURE OF THE PLAINTIFFS TO  
error or appeal as the case may be, the court  
may within the time limited herein, the court  
or writ of error will be dismissed on motion and  
without notice on the call of  
the court, unless the delay is excused upon the  
compliance to be made by affidavit."

The cause has been taken and is now reached in its regular order, and in view of the failure of plaintiffs in error to comply with the rule above quoted, the writ of error must be dismissed. This is obviously not affected by the fact that the defendant in error has failed to file an appearance, since he is not required to file an appearance by any given day, nor is he required to file a brief until briefs have been filed by plaintiffs in error.

The writ of error will, therefore, be dismissed.

WRIT DISMISSED.



The court has been asked to set aside its order, and in view of the failure of plaintiffs in error to comply with the rule above quoted, the writ of error must be dismissed. This is obviously not affected by the fact that the defendant in error has failed to file an answer, since he is not required to file an answer until by any given day, nor is he required to file a writ until writs have been filed by plaintiffs in error.

The writ of error will, therefore, be dismissed.

WRIT DISMISSED.

LOUIS W. HILL and WATSON P.

DAVIDSON,

Defendants in Error,

vs.

NATHAN AROSON,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 517

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error seeks to reverse an order of the Municipal Court overruling his motion to vacate a judgment rendered by confession against him for \$550.00 under a cognovit contained in a lease. The statement of claim recites that it is for rent accrued under a lease executed by plaintiff's assignor, whereby defendant undertook to pay \$500.00 as rent for the month of June, A. D. 1915, for certain premises therein described. The lease contained the following stipulation:

"It is understood that the said lessor shall not lease any portion of the building in which the above premises are located to any one for the purpose of retailing liquors or carrying on a saloon or buffet business."

Plaintiff in error presented his affidavit, in which he set out, among other things, the clause just quoted, and stated that in violation of this agreement, the lessor or his assignees had, about November 1, 1914, demised a portion of the second floor of said premises to certain parties for the purpose of retailing liquors and carrying on a general saloon or buffet business; that the parties were operating the same under a license issued by the City of Chicago, and were soliciting liquor and saloon business from the tenants of the building and from the public generally, and that consequently it was no longer possible for his sub-tenant to continue the saloon business, and he therefore surrendered possession April 30, 1915. He also presented an affidavit of his sub-tenant to the same effect.

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1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

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add, "completing what he started at the University of Michigan."

Journal of the American Statistical Association

<sup>1</sup> *Journal of Management Education* 14(3): 305-315, 1990.

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A limited number of British Railways Ltd. tickets were

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The defendants in error, who recovered under the terms of the lease, did so by virtue of the fact that they stood in the shoes of their assignor, and they are, therefore, of necessity bound by all the terms of the lease in the same manner in which he was bound. The question fairly presented to this court is as to whether the violation of the clause in the lease against leasing any other portion of the building for saloon or buffet purposes, on November 1, 1914, and the continued violation for a period of six months, was sufficient to justify plaintiff in error in rescinding the lease. The value of the premises to the lessee for the purpose for which they were leased obviously depended in a large measure upon the observance by the lessor of the stipulation against any leasing of any portion of the building to any other party for the purpose of retailing liquors or carrying on a saloon or buffet business. In view of that fact the case of University Club v. Deakin, 265 Ill. 257 is controlling. There, the court held that the violation of a clause in a lease which provided that "lessor hereby agrees during the term of this lease not to rent any other store in said University Club building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls," entitled the lessee to terminate the lease. The court said, page 260:

"It was concerning a matter in reference to which the parties had a perfect right to contract, and it will be presumed that plaintiff in error would not have entered into the contract if this clause had not been made a part of it."

There is nothing in the argument presented by counsel for defendants in error that the clause recites that "it is understood," instead of "it is agreed."

As the matter set up in the affidavit, if true, constituted a defense to the action, it was the duty of the trial court to open up the judgment and permit the plaintiff



[illegible]

1. The Commission has received information from the  
2. Department of the Interior that the Bureau of Land  
3. Management is planning to acquire certain lands in  
4. the State of California for the purpose of  
5. establishing a national monument. The Commission  
6. has been requested to advise the Department of the  
7. Interior as to whether or not the proposed acquisition  
8. of the lands is in the public interest. The Commission  
9. has considered the matter and has concluded that the  
10. proposed acquisition of the lands is in the public  
11. interest and that the Department of the Interior  
12. should be authorized to acquire the lands for the  
13. purpose of establishing a national monument.

There is nothing in the present record of the  
Committee for Un-American Activities which would indicate that  
"it is necessary," however, to be aware of the  
fact that the Committee is not a body of  
experts in the field of the activities of the  
Committee. It is a body of experts in the field of the  
Committee.

in error to file an affidavit of merits and plead to defendants in errors' cause of action. The order of the Municipal Court denying this motion is, therefore, reversed, and the cause will be remanded to that court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

in error is filed on account of error in the original copy  
in error, none of which. The copy of the original copy  
being this error in the original, revised, and the copy will  
be included in the original copy in the original copy in the original copy.

201 - 21595

BICKETT COAL AND COKE COMPANY,  
a corporation,

Plaintiff in Error,

vs.

JOHN W. KEOGH & COMPANY,  
a corporation,

Defendant in Error.

2744  
ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 527

MR. JUSTICE TAYLOR delivered the opinion of  
the court.

This is a suit of the 4th class, brought in the Municipal Court by Bickett Coal & Coke Company, plaintiff in error (hereinafter designated plaintiff) against John W. Keogh & Company, defendant in error, (hereinafter designated defendant) for a balance of \$260.22, claimed to be due as part of the selling price of ten carloads of coal shipped to the defendant; five cars being sent to the defendant's factory at Soldiers' Grove, Wisconsin, and five cars being sent to the defendant's factory at East Dubuque, Illinois, in the Summer of 1912.

The plaintiff filed a statement of claim for coal furnished at the request of the defendant, and upon an account stated. The defendant filed an affidavit of merits, denying the account stated, and stating that the defendant objected to the quality of the coal; that it refused to pay therefor; that it requested the removal of the coal and that the coal furnished was not "Lincoln Nut" as ordered, but was coal of an inferior quality.



ALBERT COAL AND COKE COMPANY,  
a corporation,

Plaintiff in Error,

vs.

vs.

JOHN T. KROG & COMPANY,  
a corporation,

Defendant in Error.

IN SENATE,  
JANUARY 10, 1906.

201 A. 527

MR. JUSTICE TAYLOR delivered the opinion of

the court.

This is a suit of the 4th class, brought in  
the Municipal Court by Albert Coal & Coke Company, plain-  
tiff in error (hereinafter designated plaintiff) against  
John T. Krog & Company, defendant in error, (hereinafter  
designated defendant) for a balance of \$265.22, claimed to  
be due as part of the selling price of two carloads of  
coal shipped to the defendant; five cars being sent to  
the defendant's factory at Soldiers' Grove, Wisconsin,  
and five cars being sent to the defendant's factory at  
West Ludwigs, Illinois, in the summer of 1904.

The plaintiff filed a statement of claim for coal  
furnished at the request of the defendant, and upon an  
account stated. The defendant filed an affidavit of denial,  
contesting the account stated, and stating that the defendant  
objected to the quality of the coal; that it refused to pay  
therefor; that it requested the removal of the coal and  
that the coal furnished was not "Indiana bit" as warranted,  
but was coal of an inferior quality.

The defendant also filed a statement of claim of set-off, alleging that the defendant's claim is for money paid to the plaintiff for coal and freight; that the coal shipped was not of the quality ordered and was wholly unfit for use; that he was obliged to pay the freight before he could get the coal; that immediately thereon he paid to the plaintiff the purchase price of said coal; that at that time it, the defendant, did not know and had no means of finding out that the coal was of an inferior grade and not as ordered, and unfit for use; that immediately upon finding that out, it, the defendant, notified the plaintiff that it would not accept the coal and requested the plaintiff to remove it; that the amount of money due to the defendant from the plaintiff for said coal and freight thereon, and for freight on the coal mentioned in plaintiff's statement of claim, and for having said cars of coal unloaded, is \$985.50.

The plaintiff filed an affidavit of merits to the defendant's statement of set-off, alleging that the freight charges are part of the purchase price of the coal and that all of the coal was of the same quality as represented to the defendant at the time the order was taken.

In the year 1912, the plaintiff was in the business of selling coal in carload lots, and the defendant, in July, August and September, of that year, was engaged in the manufacture of excelsior, etc., and had two factories, one at Soldiers' Grove, Wisconsin, and one at East Dubuque, Illinois.

On July 10, 1912, the defendant brought two carloads of Franklin coal. Prior to that time the defendant had used,

The defendant also filed a statement of claim

of recovery, alleging that the defendant's claim is for money paid to the plaintiff for coal and freight; that the coal shipped was not of the quality ordered and was

shipped only for use; that he was obliged to pay the freight before he could get the coal; that immediately thereon he paid to the plaintiff the purchase price of said coal; that at that time it, the defendant, did not know and had no means of finding out that the coal was of an inferior grade and not as ordered, and that for use; that immediately upon finding that out, it, the

defendant, notified the plaintiff that it would not accept the coal and requested the plaintiff to remove it; that the amount of money due to the defendant from the plaintiff for said coal and freight thereon, and for freight on the coal mentioned in plaintiff's statement of claim, and for having said coal unloaded, is \$588.50.

The plaintiff filed an affidavit of denial to the defendant's statement of recovery, alleging that the freight charges are part of the purchase price of the coal and that all of the coal was of the same quality as represented to the defendant at the time the order was taken.

In the year 1912, the plaintiff was in the business of selling coal in certain lots, and the defendant, in July, August and September, of that year, was engaged in the purchase of coal, and had two transactions, one at Elkhart, Grove, Wisconsin, and one at Hazel, Wisconsin, in

On July 10, 1912, the defendant bought two carloads of premium coal. Prior to that time the defendant had used



with the exception of a small amount of coal bought from a local dealer at Soldiers' Grove, wood fuel, exclusively, at Soldiers' Grove. In the month of August, 1912, one Cone, representing the plaintiff, went to the office of the defendant, in Chicago, in an effort to sell coal to the defendant. Keogh, representing the defendant, and Cone, representing the plaintiff, talked over the subject of buying and selling coal for the plants mentioned. There is considerable conflict as to what was said at that time. Keogh testified that he told Cone that he had formerly had some inferior coal which "ran" and caused the grates to burn out; that they had used a line of coal at East Dubuque from the Burton & Ziegler District; that Cone said he could ship the defendant just as good coal; that he Keogh, then discussed what the defendant wanted in the way of coal; that it wanted coal which would be at a lower freight rate than from Franklin County; that Cone said, "I know just what you want. I will figure it out and let you know what we can do;" that Cone went back to his office and sent the defendant a proposition, naming prices for Franklin County coal, Lincoln Nut coal, and also some Springfield coal; that Keogh told Cone that the defendant had tried Springfield coal; that they could not use it; that then Cone revised his prices, both on the Franklin County coal and on the Lincoln County coal. The written proposition was as follows:

Lincoln roller screened 1 1/2 x 7/8" clean		
raw nut coal, Illinois Central delivery,		
E. Dubuque,	\$2.55	\$2.30
C. M. & St. P. delivery, Soldiers' Grove.	<u>2.97</u>	2.90
Same size nut, but shipment to be made		
from the Springfield district, good clean		
coal, 10¢ per ton less at that point.		



From the following list of names, select the names of the persons who are known to be in the area of the investigation, and indicate the date of the last contact with each person.

$$\begin{array}{r} 28.36 \\ 0.9 \overline{) 25.524} \\ \underline{25.2} \phantom{0} \\ 324 \phantom{0} \\ \underline{270} \phantom{0} \\ 540 \phantom{0} \\ \underline{540} \phantom{0} \\ 0 \end{array}$$

#2 or #3 washed coal, from Virden, Illinois,	
I.C. or C.B. & Q. delivery, E. Dubuque,	2.56
C.M. & St. P. delivery, Soldiers' Grove	3.17

Keogh further testified that he asked Cone if the plaintiff could not give the defendant coal from a nearer mine that would be just as good coal; that Cone said "he knew just what we wanted." "I was to leave it to him and he would see that we got the proper thing;" that Cone stated that "the quality of the coal would be as good as the Franklin County coal which we had, and which would be satisfactory." As a result of the negotiations between Keogh and Cone, five cars of 1 1/2 x 7/8" Nut, at \$2.90, were ordered on August 31, 1912, to be shipped to Soldiers' Grove, and on August 30, 1912, five cars 1 1/2 x 7/8" Lincoln Nut, at \$2.30, to be shipped to East Dubuque. Accordingly the ten tons of coal were shipped between August 31, 1913, and September 21, 1913. Some of the coal arrived in September; and all of it probably before October 8, 1913.

On October 5th, the defendant complained that the "Nut" coal which had been shipped to Soldiers' Grove and East Dubuque had not proven satisfactory. Keogh testified that he telephoned Cone that he had a letter from Soldiers' Grove, stating that the coal seemed to be full of glass; that it melted and clogged the grates with clinkers; that it was useless for their purpose; that he got a sample of the coal sent to Chicago, by express, and about a week afterwards gave Cone a sample; that subsequently he showed Cone a sample of the coal, and Cone said "if I had known how you were fixed up there at Soldiers' Grove, I would never have sent you the coal;" that he then asked Cone for shipping directions, meaning to where shall I send it, and that Cone said "I don't know where to send it." The defendant was in the habit of

U.S. & F. Delivery, Holders' Grove 3.17  
 I.C. or C.E. Delivery, E. Mine 1.50  
 U.S. or F. Delivery, from Alden, Illinois 1.50

Geoff further testified that he never knew if the plaintiffs could not give the defendant coal from a nearby mine that would be just as good coal; that Geoff said "he knew just what we wanted." "I was to leave it to him and he would see that we got the proper thing;" Geoff stated that "the quality of the coal could be as good as the Franklin County coal which we had, and which would be satisfactory." As a result of the negotiations between Geoff and Goss, five cars of 1 1/2 x 7/8" Nut, at \$2.90, were ordered on August 21, 1912, to be shipped to Holders' Grove, and on August 25, 1912, five cars of 1 1/2 x 7/8" Lincoln Nut, at \$1.30, were shipped to West Dubuque. Accordingly the two cars of coal were shipped between August 21, 1912, and September 21, 1912. Some of the coal arrived in September; and all of it probably before October 2, 1912.

On October 8th, the defendant complained that the "Nut" coal which had been shipped to Holders' Grove was just inferior and not proven satisfactory. Geoff testified that he telephoned Goss that he had a letter from Holders' Grove, stating that the coal seemed to be full of dust; that it failed and clogged the grates with clinkers; that it was useless for their purpose; that he got a sample of the coal sent to Chicago, by express, and about a week afterwards Goss gave him a sample; that subsequently he showed Goss a sample of the coal, and Goss said "if I had known how you were fixed up there at Holders' Grove, I would never have sent you the coal;" that he then asked Goss for shipping directions, and Goss told him that he had it, and that Goss said "I don't know where to send it." The defendant was in the habit of



using sawdust and the ends of logs of wood and excelsior with the coal. Keogh testified further that he told Cone the coal might be good for a plant which had a large surplus of grate surface, and also that when the defendant bought the first two cars from Cone, meaning the Franklin County coal, he, Cone, was told about the plants and that they used wood as a fuel, together with the coal. On November 29, 1912, the defendant wrote the plaintiff, asking for shipping directions "so that we may get rid of the objectionable fuel;" also on May 29, 1913, the defendant notified the plaintiff that the coal was still on the ground at Soldiers' Grove and East Dubuque, subject to the plaintiff's order.

The defendant's witnesses, Stevenson and Stanterf, who were fireman and foreman, respectively, for the defendant, at Soldiers' Grove, in the Summer and Fall of 1912, both testified that the first two cars of coal, meaning the Franklin coal, was satisfactory, but that the five cars, referring to the Nut coal, clinkered and ran. Stevenson testified, "It would run like tar, and it would fill the grates up," etc. "After I tried to burn it two or three weeks I quit entirely," and Stanterf testified, "it appeared to be soft and the clinkers ran like molasses"; that he complained to Mr. Keogh about the quality of the coal in the five car lot, a few days after they commenced to use it; also that he sent a sample of it to Keogh, in Chicago.

The whole of the ten cars of coal consisted of "Lincoln Nut", sometimes called "nut" and sometimes "#2 Nut." There is some evidence, which is very slight, however, by E. O. Stevenson, as to the quality of the coal and as to a



using magnets and the ends of logs of wood and excelsior with the coal. Keogh testified further that he told Gonyea the coal might be good for a plant which had a large surplus of waste refuse, and also that when the defendant bought the first two cars from Gonyea, meaning the Franklin County coal, he, Gonyea, was told about the plants and that they were used as a fuel, together with the coal. On November 29, 1912, the defendant wrote the plaintiff, asking for shipping directions "so that we may get rid of the objectionable fuel;" also on May 29, 1913, the defendant notified the plaintiff that the coal was still on the ground at Goldiers' Grove and West Dubuque, subject to the plaintiff's order.

The defendant's witnesses, Stevenson and Stenfort, who were fireman and foreman, respectively, for the defendant at Goldiers' Grove, in the summer and fall of 1912, both testified that the first two cars of coal, meaning the Franklin coal, was satisfactory, but that the five cars, referring to the Mt. coal, clinkered and ran. Stevenson testified, "it would run like tar, and it would fill the ground up," etc. "After I tried to burn it two or three weeks I quit entirely," and Stenfort testified, "it appeared to be soft and the clinkers ran like molasses"; that he complained to Mr. Keogh about the quality of the coal in the first car lot, a few days after they commenced to use it; also that he sent a sample of it to Keogh, in Chicago.

The value of the two cars of coal consisting of "Franklin Mt.", sometimes called "Mt." and sometimes "Mt. Mt." there is some evidence, which is very slight, however, by W. O. Stevenson, as to the quality of the coal and as to

conversation between Fisher and Claude Stevenson, all of which, however, may be looked upon as of no material importance. The witness, Cone, for the plaintiff, denies categorically that he told Keogh, the witness for the defendant, that the ten cars of Lincoln Nut would be as good as Franklin coal, which he had previously shipped. He also testified that he had no recollection that he told Keogh that if he had known the condition at the plants he would not have shipped that coal; also that he did not recollect telling Keogh, when the latter requested to have the coal removed, that they had no place to which it could be removed; that Keogh showed him samples of the coal at his office, about October 25, 1912; that Lincoln #2 Nut is as good steam producing coal as can be found in and around Springfield; that he did not tell Keogh that he had #2 Lincoln Nut coal that produced as good results as Franklin County coal; that that would not be true; that in a conversation with Keogh, it was a question as to something cheaper, something that would answer the purpose and that would be cheaper than the Franklin. When, however, Cone was asked on his examination "you say you told Mr. Keogh that this Lincoln coal would answer his purpose," etc., he answered "Well, I inferred that it would, of course, I presume so;" that he could not answer whether he told Keogh that it would answer his purpose.

The five cars of coal at Soldiers' Grove and the five cars at East Dubuque, with the exception of a small portion of each amount which was used, remained in the yards of the defendant. The coal located at East Dubuque, within ten days or two weeks after it arrived, caught on

controversy between Fisher and Claude Stevenson, all of whom, however, may be looked upon as of no material importance. The witness, then, for the plaintiff, denies categorically that he told Geo. H. Lincoln for the defendant that the few cars of Lincoln but would be as good as Franklin coal, which he had previously shipped. He also testified that he had no recollection that he told Geo. H. Lincoln that it was known the condition of the plants he would not have shipped that coal; also that he did not recollect selling, except, when the latter requested to have the coal removed, that they had no place to which it could be removed; that Geo. H. Lincoln moved his samples of the coal at his office, about October 22, 1912; that Lincoln said "But is a good steam producing coal as can be found in and around Springfield; that he did not tell Geo. H. Lincoln that he had 25 Lincoln but coal that produced as good results as Franklin County coal; that that would not be true; that in a conversation with Geo. H. Lincoln it was a question as to something cheaper, something that would answer the purpose and that would be cheaper than the Franklin. Then, however, there was asked on his examination "You say you told Mr. Lincoln that this Lincoln coal would answer his purpose," etc., he answered "Well, I inferred that it would, of course, I presume so; that he could not answer whether he told Geo. H. Lincoln that it would answer his purpose."

The five cars of coal at Soldiers' Grove and the five cars at West Linn, with the exception of a small portion of each amount which was used, remained in the yards of the defendant. The coal located at West Linn, within ten days or two weeks after it arrived, came on



fire and burned for a year or more. The evidence shows that to load the coal on cars and take it away was more or less impracticable as it would cost five times as much as the original price of the coal.

The cause was tried in the lower court by the trial judge, without a jury, and a judgment in the sum of \$702.15 was entered in favor of the defendant, upon its set-off.

It is contended by the plaintiff; (1) that the defendant, in its affidavit of merits and statement of claim, alleges that it bought "No. 2 Lincoln Nut" coal, and that the plaintiff did not deliver "No. 2 Lincoln Nut" but an inferior coal; that "No. 2 Lincoln Nut" was the name of a certain kind of coal known in commercial trade, and not a warranty that it would produce any given result.

There is some ambiguity in the use of the words "that the coal furnished defendant by plaintiff was not Lincoln Nut, as ordered, but was coal of an inferior quality." The affidavit of merits, however, states positively that the defendant objected to the quality of the coal as not being according to order. Considering the whole of the affidavit of merits, we are of the opinion that it sets forth sufficient facts to apprise the plaintiff that it, the defendant, would undertake to show that the coal was not of the grade or quality ordered. Further, the record does not show that the defendant objected to any evidence on the ground that it did not tend to support the defense set up in the affidavit of merits. There is no doubt also but that the statement of claim of set-off sets up a breach of warranty and alleges damages arising there-



the and further for a year or more. The evidence shows that the load was not as heavy and that it was not more or less impossible as it would cost five times as much as the original price of the coal.

The case was tried in the lower court by the trial judge, without a jury, and a judgment in the sum of \$750.00 was entered in favor of the defendant, upon the following facts:

It is contended by the plaintiff; (1) that the defendant, in its affidavit of merits and statement of claim, alleges that it bought "No. 2 Lincoln" coal, and that the plaintiff did not deliver "No. 2 Lincoln" coal; but an inferior coal; that "No. 2 Lincoln" coal was the name of a certain kind of coal known in commercial circles, and not a variety that it would produce any given result.

There is some ambiguity in the use of the words "that the coal furnished defendant by plaintiff was not Lincoln but, an inferior, but was coal of an inferior quality." The affidavit of merits, however, states positively that the defendant objected to the quality of the coal on the ground that it was not the same as the coal of the affidavit of merits, and on the opinion that it was not the same as the coal of the plaintiff's affidavit of merits, would undertake to show that the coal was not of the same or quality offered. Further, the record does not show that the defendant objected to any variance on the ground that it did not tend to support the defense set up in the affidavit of merits. There is no doubt also that the defendant of claim of not-offer was a variety of variety and alleged damages arising there-

from, and sufficiently informed the plaintiff of the exact nature of the defendant's claim.

It is contended further, that no special warranty was established. It is, of course, true as claimed by the plaintiff that even if the plaintiff's statements amounted to a warranty, they must have been relied on by the purchaser to constitute a warranty in law, and that the burden of proof of a warranty and a breach thereof, is upon the party relying thereon as a defense, and that mere expressions of opinion by which the plaintiff commends his coal, will not create a warranty.

Applying those principles and assuming that the trial judge believed the testimony and evidence of the defendants, bearing in mind particularly the facts to which the witness Keogh testified, we are compelled to the conclusion that there was ample evidence that the plaintiff gave a warranty and broke it. If Cone, representing the plaintiff, in obtaining orders from Keogh, representing the defendant, led Keogh, representing the defendant, to believe, by the promise which he made, that the quality of the coal would be as good as the Franklin County coal, and to rely upon it, there is no doubt but that it constituted a warranty. The evidence as to the coal that was furnished being unsatisfactory and inferior ~~xxxx~~ is amply sufficient to prove that the coal was not of the quality represented and promised.

Upon a careful analysis of the evidence and an examination of the record, we are of the opinion that the

them, and sufficiently informed the plaintiff of the exact nature of the defendant's claim.

It is contended further, that no special warranty was established. It is, of course, true as claimed by the plaintiff that even if the plaintiff's statements amounted to a warranty, they must have been relied on by the defendant to constitute a warranty in law, and that the burden of proof of a warranty and a breach thereof, is upon the party relying thereon as a defense, and that mere expressions of opinion by which the plaintiff commends his coal, will not create a warranty.

Applying these principles and assuming that the trial judge believed the testimony and evidence of the defendant, bearing in mind particularly the facts to which the witness Keith testified, we are compelled to the conclusion that there was ample evidence that the plaintiff gave a warranty and broke it. If done, representing the plaintiff, in obtaining orders from Keith, representing the defendant, Joe Keith, representing the defendant, to believe, by the promise which he made, that the quality of the coal would be as good as the Standard County coal, and to rely upon it, there is no doubt that it constituted a warranty. The evidence as to the coal that was furnished being unobjectionable and inferior xxx is amply sufficient to prove that the coal was not of the quality represented and promised.

Upon a careful analysis of the evidence and an examination of the record, we are of the opinion that the

judgment of the trial court should be affirmed.

AFFIRMED.



.Basilica of Santa Cruz del Tiro de la Cruzada,

.JORDIETA

Filed March 28, 1917

284 - 21680

E. I. DU PONT DE NEMOURS POWDER  
COMPANY, a corporation.

Plaintiff, Defendant in Error.

vs. :

J. R. H. ROBINSON & SON CONTRACT-  
ING COMPANY, a corporation.

Defendant, Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 529

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit brought in the Municipal Court for the balance of an account alleged to be due for explosives and blasting supplies. We shall refer to the parties by the titles used in the trial court.

On May 18, 1914, the plaintiff filed a statement of claim for the sum of \$2427.14. On August 6, 1914, the defendant filed an affidavit of merits, in which affidavit of merits the defendant stated that it never ordered the dynamite set down in the account attached to the statement of claim; that it ordered dynamite of a different kind and strength; that the defendant relied upon certain misrepresentations of the plaintiff as to the kind of dynamite that was shipped; that the dynamite that was shipped did not do the work and the defendant was damaged in a sum exceeding the amount sued for.

On September 22, 1914, the court struck the defendant's affidavit of merits from the files and by leave of court the defendant on October 1, 1914, filed



an amended affidavit of merits, in which the defendant reiterated what it had set forth in its original affidavit of merits, and also added thereto certain allegations in regard to the alleged deceit and fraud of the plaintiff in regard to the particular dynamite that had been furnished.

On April 7, 1915, the plaintiff, by leave of court, filed an amended statement of claim. It is a voluminous document covering, together with the exhibits, 54 pages of the abstract. It consists substantially of a repetition of that which was alleged in the original statement, together with what purports to be an answer to certain allegations in the amended affidavit of merits.

On April 27, 1915, the defendant filed an amended affidavit of merits, which said affidavit of merits was on June 2, 1915, stricken from the files. On the same day the defendant moved to strike the plaintiff's amended statement of claim from the files, which motion was overruled. The defendant then filed a "second amended affidavit of merits and set-off." In the latter affidavit of merits the defendant states that it "never ordered the dynamite set down in the account attached to the statement of claim filed by the plaintiff;" that it ordered dynamite of a different kind and strength; that it undertook to do certain excavation work for the Sanitary District of Chicago; that the plaintiff recommended the use of nitro-glycerine dynamite; that the defendant contracted with the plaintiff for a supply of necessary explosives for the prosecution of said work; that nitro glycerine was the best adapted for the work; that certain quantities of explosive on the order of the defendant were delivered to the defendant; that it was impossible for the defendant to distinguish that which it re





it received from the nitro-glycerine dynamite it had ordered; that the explosive so delivered was of an inferior grade and kind and not adapted for said work; that the fact was well known to plaintiff; that it ordered from plaintiff further amounts of the same grade and kind of explosive as in its first order; that it received from plaintiff the quantities <sup>of</sup> explosives so ordered believing it to be of the kind and grade it had first ordered; that in fact it was all of the inferior grade and was known to be such by the plaintiff; that such knowledge was by plaintiff concealed from the defendant; that the plaintiff as the work progressed inspected it and directed the manner in which said explosives should be used; that defendant not obtaining the proper results from said explosives notified plaintiff; whereupon the plaintiff inspected the work and assured defendant that the explosives were all nitro-glycerine dynamite; that defendant relying upon said representations continued the use of said explosives from September 20, 1913, to November 21, 1913; that at various times during said period plaintiff fraudulently and deceitfully represented to defendant that the dynamite being furnished was nitro-glycerine dynamite and was of the kind, quality and strength ordered by the defendant; that in fact the dynamite so furnished was not nitro-glycerine dynamite; that the defendant having no knowledge and no other means of obtaining information as to the truth and correctness of the representations made by plaintiff and believing and relying implicitly thereon, continued to use said dynamite as directed by plaintiff in making said excavation; that the defendant about November 21, 1913, notified the plaintiff of its intention to have said explosives analyzed to ascertain their grade; that



the plaintiff then admitted that the explosives it had furnished were not the grade ordered but an inferior grade; that it, the defendant, was compelled to do certain blasting and excavation work over again by reason of the inferior quality of the explosives delivered by the plaintiff; that because of the facts set forth, it, the defendant, was greatly damaged in a sum far exceeding the amount sued for by the plaintiff.

On June 9, 1910, the foregoing amended affidavit of merits was stricken from the files, and the defendant electing to stand by its amended affidavit of merits, the trial judge entered judgment for the plaintiff in the sum of \$2527.14.

It is contended by the defendant that the second amended affidavit of merits should not have been stricken from the files; that it not only sufficiently denied plaintiff's demand, but also set up a defense by way of recoupment. On the other hand, it is contended by the plaintiff that the second amended affidavit of merits violated Rule 26 of the Municipal Court.

Briefly stated, the second amended affidavit of merits sets forth as a defense (1) that it, the defendant, never ordered the dynamite referred to in the statement attached to the statement of claim; (2) that it ordered dynamite of a different kind and strength; (3) that the plaintiff in purporting to fill the orders of the defendant and in delivering what it represented as dynamite, was guilty of fraud and deceit, which fraud and deceit are set forth in some detail. Upon a careful scrutiny of the second amended affidavit of merits, we are of the opinion that it is not excessive; that, considered as a pleading,





it is particularly direct and expressive, and deals specifically with the material allegations of the statement of claim. Hubert v. City of Chicago, 271 Ill. 484. It recites very much in detail a series of facts, which when taken together, justify the conclusion that if they are proven, a fraud was perpetrated by the plaintiff and the defendant imposed upon, that there never was delivered by the plaintiff to the defendant the merchandise it ordered. This court, of course, will take judicial notice that dynamite is an explosive and its quality could not be ascertained by the defendant unless by using it and considering its results, or by having made an expert chemical analysis of it. A mere examination of the boxes and their contents would not necessarily inform the defendant of the quality of the dynamite. It is also true that an opportunity to examine the dynamite and its subsequent use by the defendant does not constitute an admission that the quality is satisfactory and that it conforms to the contract. The cases cited by the plaintiff, W. C. Williams Co. v. Ames Motor Co., 243 Ill. App. 194, and Ames Motor Co. v. Williams Co., 193 Ill. App. 407, are therefore not in point.

The plaintiff in its amended statement of claim alleges that the defendant was not licensed to do business in the State of Illinois; also that the defendant had pending in the Superior Court of Cook County a suit for the purpose of recovering unliquidated damages for an alleged breach of the contract in this case. The allegations in regard to the lis pendens are inappropriate and of right should not be set forth in the plaintiff's statement of claim. As to the allegations pertaining to the defendant not being licensed to do business in the State of Illinois, they are sufficiently



denied in the affidavit of merits.

The great volume of pleadings in this case, having special reference to the plaintiff's amended and additional statement of claim, compel us to condemn such a misuse of the rules of the Municipal Court, believing as we do that these rules were adopted rather to prevent than to increase the prolixity of pleadings in the Municipal Court.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.





317 - 21713

J. S. HOFFMAN COMPANY,  
a corporation,

Defendant in Error,

vs.

STERLING PACKING COMPANY,  
a corporation,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 531

MR. JUSTICE TAYLOR delivered the opinion of  
the court.

This is a suit brought by the defendant in error  
(hereinafter called the plaintiff) against the plaintiff  
in error (hereinafter called the defendant) for the sum  
of \$975.25, for goods sold and delivered and upon an  
account stated. The chief question in the case is whether  
the trial judge erred in striking the amended affidavit  
of merits and amended statement of set-off and entering  
judgment, upon the plaintiff's statement of claim, against  
the defendant.

The affidavit of merits consists of four para-  
graphs; the first paragraph alleges a sale and delivery of  
certain barrels of dried beef on an open account; that the  
plaintiff represented the merchandise to be of first class  
quality; that the defendant relying on that representation  
and before inspection paid to the plaintiff the purchase  
price; that upon inspection the defendant found the merchan-  
dise was of an inferior quality and not as represented and  
guaranteed by plaintiff and ordered by the defendant; that  
upon the discovery that the merchandise was not as guaranteed

217 - 2173

J. B. HUBBARD COMPANY,  
a corporation.

Defendant in Error.

vs.

WILLIAM TAYLOR,  
Plaintiff in Error.

WILLIAM TAYLOR,  
Plaintiff in Error.

204 I.A. 381

MR. JUSTICE TAYLOR delivered the opinion of

the court.

This is a writ brought by the defendant in error (hereinafter called the plaintiff) against the plaintiff in error (hereinafter called the defendant) for the sum of \$375.00, for goods sold and delivered and upon an account stated. The chief question in the case is whether the trial judge erred in striking the pleaded affidavit of denial and granting judgment of set-off and entering judgment upon the plaintiff's statement of claim, against the defendant.

The affidavit of denial was made of four parts: first, the first paragraph alleged a sale and delivery of certain goods of dried beef on an open account; that the plaintiff represented the merchandise to be of first class quality; that the defendant relying on that representation and before inspection paid to the plaintiff the purchase price; that upon inspection the defendant found the merchandise was of an inferior quality and not as represented and returned by plaintiff and ordered by the defendant; that upon the discovery that the merchandise was not as furnished

nor as represented, the defendant rescinded the sale and returned the warehouse receipt to the plaintiff.

The second paragraph alleges the sale and representation as in the first paragraph and alleges delivery of the merchandise by the plaintiff to a public warehouse to the order of the defendant; that among persons dealing in dried beef at wholesale in the City of Chicago and elsewhere there was prevailing a general custom that each barrel of dried beef constitutes a separate lot, subject to inspection and return if not as represented; that relying upon the representations made by the plaintiff as to the quality of the beef, the defendant before inspection paid to the plaintiff the purchase price of the dried beef; that upon inspection the dried beef was found not to be as represented and guaranteed; that thereupon the defendant rescinded the sale and returned the warehouse receipt to the plaintiff.

The third paragraph is substantially the same as the second, but alleges a general custom known to the plaintiff that if any portion of the deliveries of dried beef is not as represented, then under certain circumstances, such as are set out in the third paragraph, there is a right to return to the seller such separate pieces of beef as are not according to the contract of sale, and a duty on the part of the vendor to accept a return and credit the purchase price of the same to the buyer.

The fourth paragraph is like the third, save that it does not allege on the part of the plaintiff any knowledge of the custom.



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The second paragraph alleges that the defendant  
continued up in the first paragraph and alleged delivery of  
the same to the plaintiff in the second paragraph in  
the third of the defendant; that the defendant having in  
the first part of the paragraph in the third of the defendant  
to have the defendant a general release from the plaintiff of  
the defendant a general release from the plaintiff to the plaintiff  
and to have it not be represented; that the plaintiff was the  
defendant's name by the plaintiff as to the plaintiff of  
the first, the defendant before the plaintiff in the first  
with the plaintiff at the first part; that upon the  
petition the first part was found not to be represented  
and the defendant; that the plaintiff was not represented the  
also was represented the defendant named in the plaintiff.

of the same in the paper.

It does not appear on the part of the physician any more.

The defendant's statement of set-off consists substantially of similar averments to those contained in the amended affidavit of merits.

It is claimed by the defendant that under Rule 22 of the Municipal Court, the court has the power to strike a pleading and render judgment only when the defense is clearly unfounded in law.

On the other hand, the plaintiff contends (1) that the defendant's pleadings do not state facts showing that the beef it offers to return was inspected and tendered back to the seller within a reasonable time after delivery; (2) that they do not state the facts showing that the defendant notified the plaintiff of the defects in the beef and gave the plaintiff an opportunity to replace the same with beef of the agreed quality; (3) do not show a defense to the plaintiff's statement of claim because an entire contract cannot be rescinded in part; (4) that the transaction was an executed sale which the buyer cannot rescind for breach of warranty where no fraud is alleged; (5) that the customs alleged are unreasonable, indefinite and uncertain and in contravention of general policy and are not competent in evidence in this case; (6) that they show an unliquidated claim arising out of different transactions from that upon which plaintiff's claim is based and cannot be set-off or recouped in this suit; (7) that they do not show that defendant's set-off accrued before the plaintiff's suit was filed.

Inasmuch as it has been decided that one of the intentions of the Municipal Court Act was to simplify plead-

The defendant's statement to the effect that he was not responsible for the actions of the other persons in the same way as he was in the case of the other persons.

It is stated by the defendant that the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons.

On the other hand, the plaintiff contends (1) that the defendant's statement to the effect that he was not responsible for the actions of the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons; (2) that the defendant's statement to the effect that he was not responsible for the actions of the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons; (3) that the defendant's statement to the effect that he was not responsible for the actions of the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons; (4) that the defendant's statement to the effect that he was not responsible for the actions of the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons; (5) that the defendant's statement to the effect that he was not responsible for the actions of the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons; (6) that the defendant's statement to the effect that he was not responsible for the actions of the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons; (7) that the defendant's statement to the effect that he was not responsible for the actions of the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons.

It is stated by the defendant that the other persons in the same way as he was in the case of the other persons, the court has the power to give a judgment and verdict which will be the same as the judgment given in the case of the other persons.



ings, and as Rule 23 of the Municipal Court provides that "if it appears that the party filing a statement of claim or affidavit is relying on a cause of action or defense that is clearly unfounded in law, the court may order the same stricken out and the action to be dismissed or judgment to be entered accordingly as may be just," it would seem to follow that where a defendant undertakes to set up in its affidavit of merits the defense of rescission, it is not necessary to set out in detail every fact and element that would be necessary to make a complete defense, and, a fortiori, it is not necessary to set forth those facts, which if proven, might defeat his alleged defense. (Enberg v. City of Chicago, 271 Ill. 404). For example, the plaintiff claims that the defendant's affidavit of merits fails to show that there was an offer to return the merchandise within a reasonable time. What is a reasonable time is usually a question of fact for a jury and varies with the different facts and circumstances of each particular case. Plaintiff contends that there is no allegation as to when the inspection was made, "not even that it was made within a reasonable time," and that "the buyer, in order to show a prima facie right to rescind, must allege that he inspected within a reasonable time after receiving the goods." Bearing in mind, however, the purpose of the Municipal Court Act and the meaning of the rule above mentioned, we are of the opinion that it is not necessary for a defendant in an affidavit of merits and in a statement of set-off in such a case as this, where the defense is based upon rescission and an alleged custom, to set forth more than is sufficient to inform the plaintiff of the nature of the claim. It must be borne in mind that it is a pleading we are dealing with and not proof.





The plaintiff claims that the customs alleged by the defendant are unreasonable, indefinite and uncertain. It would seem, however, to be sufficient in such a pleading for the defendant to inform the plaintiff that he intended relying upon a certain general custom, the nature of which is expressly set forth. Whether or not such a custom is reasonable, or as the plaintiff claims, in contravention of general policy, are matters to be gone into only in the course of actual trial.

After carefully considering the amended affidavit of merits and amended statement of set-off, we are of the opinion that it was error to strike them from the files and enter judgment for the plaintiff. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.



348 - 21745

H. & M. STAFFORD and  
G. C. and E. M. STAMM,

Defendants in Error,

vs.

FRANCES H. WARD,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

204 I.A. 532

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 10, 1915, the defendants in error (hereinafter called plaintiffs) obtained judgment by confession, upon a warrant of attorney in a written lease, for \$130.00 and costs against the plaintiff in error, (hereinafter called the defendant.)

On July 30, 1915, the defendant moved the court to vacate the judgment and for leave to file an affidavit of merits instanter. The affidavit set forth, among other things, that she, the defendant, "entered into a written lease with the plaintiffs herein for the rent of an apartment of one of the plaintiffs' buildings, and also entered into an oral agreement with said plaintiffs for the rental of an additional room in the janitor's quarters in the basement of said building for her maid;" that she, the defendant, "entered into said written lease wholly upon the oral agreement to be permitted to have the use of this additional room in the basement of said building for her maid, as aforesaid, and that the time for which she was to have the use of said room was to expire at the time of the expiration of said lease;" "that the janitor of said building and employed by said plaintiffs, caused the maid so much annoyance and dis-





turbance that it was impossible for her to live in said room;" "that she made complaint to plaintiffs of the existence of such annoyance and disturbance;" "that plaintiffs did not prevent said annoyance and it thereupon became necessary for said maid to vacate said room;" that the defendant being deprived of said room it became necessary for her to obtain another apartment; that the rental sued for accrued after the defendant moved from said premises.

The trial judge denied the motion to vacate. On August 9, 1915, a motion was made by the defendant to vacate the order of July 30, 1915, and also to vacate the judgment and to grant the defendant leave to file an affidavit of merits, supported by affidavits. The defendant presented two affidavits of merits, only one of which, the affidavit of the defendant, it is necessary to consider. That affidavit recites "that at the time of the leasing and demising by plaintiff of the premises occupied by defendant it was mutually agreed and understood that the premises so leased were to consist of five certain rooms on one floor and one room on another floor in the same building; that said room was in that portion of the building used by the janitor and was to be occupied by defendant's maid; that the entering into the contract for the rental of plaintiffs' premises was made expressly on the condition that the demised premises contain the six rooms aforesaid; that by mutual agreement of said plaintiffs and defendant, it was agreed that the premises thus leased were the six rooms aforesaid; that defendant entered upon and occupied the said six rooms so leased as aforesaid; that because of annoyances, inconveniences,

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How does the Government intend to deal with this?

Amount of cash paid to contractor for work done on the project.

RECEIVED BY THE DIRECTOR, FBI, MAY 10 1964

NOTES BY THE DIRECTOR OF THE BUREAU OF THE CENSUS

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...and the other side of the mountain, I was told

Approved and Forw'd \_\_\_\_\_, Chief, Bureau of

at 1000 ft. alt. on 10/10/1972, 10/11/1972, 10/12/1972, 10/13/1972, 10/14/1972, 10/15/1972, 10/16/1972, 10/17/1972, 10/18/1972, 10/19/1972, 10/20/1972, 10/21/1972, 10/22/1972, 10/23/1972, 10/24/1972, 10/25/1972, 10/26/1972, 10/27/1972, 10/28/1972, 10/29/1972, 10/30/1972, 10/31/1972, 11/1/1972, 11/2/1972, 11/3/1972, 11/4/1972, 11/5/1972, 11/6/1972, 11/7/1972, 11/8/1972, 11/9/1972, 11/10/1972, 11/11/1972, 11/12/1972, 11/13/1972, 11/14/1972, 11/15/1972, 11/16/1972, 11/17/1972, 11/18/1972, 11/19/1972, 11/20/1972, 11/21/1972, 11/22/1972, 11/23/1972, 11/24/1972, 11/25/1972, 11/26/1972, 11/27/1972, 11/28/1972, 11/29/1972, 11/30/1972, 12/1/1972, 12/2/1972, 12/3/1972, 12/4/1972, 12/5/1972, 12/6/1972, 12/7/1972, 12/8/1972, 12/9/1972, 12/10/1972, 12/11/1972, 12/12/1972, 12/13/1972, 12/14/1972, 12/15/1972, 12/16/1972, 12/17/1972, 12/18/1972, 12/19/1972, 12/20/1972, 12/21/1972, 12/22/1972, 12/23/1972, 12/24/1972, 12/25/1972, 12/26/1972, 12/27/1972, 12/28/1972, 12/29/1972, 12/30/1972, 12/31/1972, 1/1/1973, 1/2/1973, 1/3/1973, 1/4/1973, 1/5/1973, 1/6/1973, 1/7/1973, 1/8/1973, 1/9/1973, 1/10/1973, 1/11/1973, 1/12/1973, 1/13/1973, 1/14/1973, 1/15/1973, 1/16/1973, 1/17/1973, 1/18/1973, 1/19/1973, 1/20/1973, 1/21/1973, 1/22/1973, 1/23/1973, 1/24/1973, 1/25/1973, 1/26/1973, 1/27/1973, 1/28/1973, 1/29/1973, 1/30/1973, 1/31/1973, 2/1/1973, 2/2/1973, 2/3/1973, 2/4/1973, 2/5/1973, 2/6/1973, 2/7/1973, 2/8/1973, 2/9/1973, 2/10/1973, 2/11/1973, 2/12/1973, 2/13/1973, 2/14/1973, 2/15/1973, 2/16/1973, 2/17/1973, 2/18/1973, 2/19/1973, 2/20/1973, 2/21/1973, 2/22/1973, 2/23/1973, 2/24/1973, 2/25/1973, 2/26/1973, 2/27/1973, 2/28/1973, 2/29/1973, 2/30/1973, 3/1/1973, 3/2/1973, 3/3/1973, 3/4/1973, 3/5/1973, 3/6/1973, 3/7/1973, 3/8/1973, 3/9/1973, 3/10/1973, 3/11/1973, 3/12/1973, 3/13/1973, 3/14/1973, 3/15/1973, 3/16/1973, 3/17/1973, 3/18/1973, 3/19/1973, 3/20/1973, 3/21/1973, 3/22/1973, 3/23/1973, 3/24/1973, 3/25/1973, 3/26/1973, 3/27/1973, 3/28/1973, 3/29/1973, 3/30/1973, 3/31/1973, 4/1/1973, 4/2/1973, 4/3/1973, 4/4/1973, 4/5/1973, 4/6/1973, 4/7/1973, 4/8/1973, 4/9/1973, 4/10/1973, 4/11/1973, 4/12/1973, 4/13/1973, 4/14/1973, 4/15/1973, 4/16/1973, 4/17/1973, 4/18/1973, 4/19/1973, 4/20/1973, 4/21/1973, 4/22/1973, 4/23/1973, 4/24/1973, 4/25/1973, 4/26/1973, 4/27/1973, 4/28/1973, 4/29/1973, 4/30/1973, 5/1/1973, 5/2/1973, 5/3/1973, 5/4/1973, 5/5/1973, 5/6/1973, 5/7/1973, 5/8/1973, 5/9/1973, 5/10/1973, 5/11/1973, 5/12/1973, 5/13/1973, 5/14/1973, 5/15/1973, 5/16/1973, 5/17/1973, 5/18/1973, 5/19/1973, 5/20/1973, 5/21/1973, 5/22/1973, 5/23/1973, 5/24/1973, 5/25/1973, 5/26/1973, 5/27/1973, 5/28/1973, 5/29/1973, 5/30/1973, 5/31/1973, 6/1/1973, 6/2/1973, 6/3/1973, 6/4/1973, 6/5/1973, 6/6/1973, 6/7/1973, 6/8/1973, 6/9/1973, 6/10/1973, 6/11/1973, 6/12/1973, 6/13/1973, 6/14/1973, 6/15/1973, 6/16/1973, 6/17/1973, 6/18/1973, 6/19/1973, 6/20/1973, 6/21/1973, 6/22/1973, 6/23/1973, 6/24/1973, 6/25/1973, 6/26/1973, 6/27/1973, 6/28/1973, 6/29/1973, 6/30/1973, 7/1/1973, 7/2/1973, 7/3/1973, 7/4/1973, 7/5/1973, 7/6/1973, 7/7/1973, 7/8/1973, 7/9/1973, 7/10/1973, 7/11/1973, 7/12/1973, 7/13/1973, 7/14/1973, 7/15/1973, 7/16/1973, 7/17/1973, 7/18/1973, 7/19/1973, 7/20/1973, 7/21/1973, 7/22/1973, 7/23/1973, 7/24/1973, 7/25/1973, 7/26/1973, 7/27/1973, 7/28/1973, 7/29/1973, 7/30/1973, 7/31/1973, 8/1/1973, 8/2/1973, 8/3/1973, 8/4/1973, 8/5/1973, 8/6/1973, 8/7/1973, 8/8/1973, 8/9/1973, 8/10/1973, 8/11/1973, 8/12/1973, 8/13/1973, 8/14/1973, 8/15/1973, 8/16/1973, 8/17/1973, 8/18/1973, 8/19/1973, 8/20/1973, 8/21/1973, 8/22/1973, 8/23/1973, 8/24/1973, 8/25/1973, 8/26/1973, 8/27/1973, 8/28/1973, 8/29/1973, 8/30/1973, 8/31/1973, 9/1/1973, 9/2/1973, 9/3/1973, 9/4/1973, 9/5/1973, 9/6/1973, 9/7/1973, 9/8/1973, 9/9/1973, 9/10/1973, 9/11/1973, 9/12/1973, 9/13/1973, 9/14/1973, 9/15/1973, 9/16/1973, 9/17/1973, 9/18/1973, 9/19/1973, 9/20/1973, 9/21/1973, 9/22/1973, 9/23/1973, 9/24/1973, 9/25/1973, 9/26/1973, 9/27/1973, 9/28/1973, 9/29/1973, 9/30/1973, 10/1/1973, 10/2/1973, 10/3/1973, 10/4/1973, 10/5/1973, 10/6/1973, 10/7/1973, 10/8/1973, 10/9/1973, 10/10/1973, 10/11/1973, 10/12/1973, 10/13/1973, 10/14/1973, 1

The following are the names of the persons who have been listed as having been present at the meeting:

-The following are suggested by the author.

...which is not your, which is not your, which is not your...

Low efficiency of the detector, a possibility of an

other. This alternative would "allow us to stay in the

THE UNIVERSITY OF CHICAGO

IN REPLY TO THE ABOVE, THE FOLLOWING IS THE INFORMATION REQUESTED:

the situation is indeed very serious.

There is one light and one dark of wood. There is one

DATE 10/10/2001 TIME 11:00 AM

10-10-68

DATE: 10/10/1964

For the record of the meeting, the following was noted:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 05-01-2001 BY 60322 UCBAW

2000-10-10 10:00:00 2000-10-10 10:00:00 2000-10-10 10:00:00

[illegible][illegible]

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quarrels and disturbances of the janitor with defendant's maids, divers maids refused to live in said room and left the employ of said defendant; that the defendant complained to the plaintiff and announced her intention of leaving and abandoning the premises because of the unbearable and irremediable condition; that plaintiff said 'they had done all they could, but that they didn't blame defendant and didn't see how she could do otherwise,' and on May 1, 1915, defendant did vacate and abandon said premises."

The trial judge denied the motion of August 9, 1915 to vacate the judgment entered on June 10, 1915.

It is contended by the defendant (1) that the affidavit sets forth an oral agreement collateral to the written lease; (2) that "in a suit to recover rent brought by the landlord upon a written sealed lease, complete upon its face, a tenant may prove an independent contract collateral to the lease, notwithstanding such contract was oral and the lease in writing and under seal, that as an inducement and consideration for the written lease the landlord agreed to rent other premises;" (3) that if there is no express covenant in a lease relating to peaceable and quiet enjoyment, the law implies one; (4) that a breach of peaceable and quiet enjoyment of part of the premises on the part of an agent or the landlord is a ground for refusal to pay rent.

An examination of the latter affidavit shows that it was therein claimed by the defendant that there was a mutual agreement and understanding that the premises leased were to consist of five certain rooms on one floor and one room on another floor, in the same building. It is not



As mentioned by the Justice Committee, there is a  
a certain amount of the Government that there was a  
actual agreement and understanding that the Government should  
not be subject to five years of the Government and the  
Government should be in the same position. It is not

It was further observed that there was a

100-443887-100

THE UNIVERSITY OF CHICAGO

There is no doubt that the above is a very good example of a well-organized and well-written report. It is a pleasure to read and a model for others to follow.

stated whether that mutual agreement and understanding was the result of the written lease alone, or the written lease and an oral agreement taken together. The terms of the written lease itself do not include the so-called maid's room which was situated on another floor in the same building. The statement in the affidavit that the entering into the contract for the rental of plaintiffs' premises was made expressly upon the condition that the demised premises contained the six rooms aforesaid, involves an enlargement of the terms of the written contract. The further statement "and by mutual agreement of said plaintiffs and defendant it was agreed that the premises thus leased were the six rooms aforesaid" is the announcement of an agreement inconsistent with the terms of the written lease. What constituted that "mutual agreement" is not stated; that is, whether it was created by the terms of the written lease, or by the terms of the written lease together with some oral contract.

In the earlier affidavit, that of July 30, 1915, the defendant set forth that she entered into an oral agreement for the rental of an additional room in the basement; that she "entered into said written lease only upon the oral agreement to be permitted to have the use of this additional room in the basement of said building for her maid as aforesaid, and that the time for which she was to have the use of said room was to expire at the time of the expiration of said lease." It would seem, therefore, that the defendant is endeavoring to make a violation of an alleged oral lease a breach of a separate and distinct written lease under seal and of

the issue together with your legal counsel.

It is not stated; that is, whether it was brought by the  
witness himself. Your investigation must be made accordingly.

There is no agreement inconsistent with the terms of the  
same issued with the witness statement. It is the same as  
plaintiff and defendant. It was stated that the plaintiff  
The former witness said by mutual agreement of both  
volves no enforcement of the terms of the witness statement.

Enriched plaintiff mentioned the six years statement, in-  
formation was made previously and the opinion that the  
witness into the subject for the period of six months,  
some building. The statement in the affidavit had the  
witness's name which was situated on another floor in the  
the witness himself to not include the so-called  
issue and an oral agreement based thereon. The terms of  
was the result of the witness's own choice, or the witness  
which showed that mutual agreement and understanding

[illegible]



different premises. Further, the written lease was for a period of two years; and if the time, at which the oral agreement as to the maid's room "was to expire" was the "time of the expiration of said lease" (meaning the written lease), obviously the oral agreement would be within the condemnation of the statute of frauds.

Both of the affidavits are somewhat ambiguous, but each seems to suggest an effort to vary the terms of the written lease, under seal, by a parol agreement. Of course, the rule is well known that parol evidence is not admissible to vary the terms of a written agreement under seal. Cooney v. Murray, 45 Ill. App. 463.

An oral agreement may have been made in regard to the leasing of the maid's room, which room did not constitute part of the premises mentioned in the written lease. But an eviction therefrom, that is, the maid's room, would not be an eviction as to the premises covered by the written lease. In order for an eviction from the maid's room to be an eviction as to the premises covered by the written lease, it would be necessary to consider the apartment and the maid's room as covered by the written lease, and that is a non sequitur. An analysis of the affidavits, made with a spirit of indulgence towards the defendant, as the case is a judgment by confession, compels us to the conclusion that no sufficient defense is therein set forth. Assuming, therefore, as we are bound to do, that the defendant has set up in her affidavits all the defense she has, no substantial advantage would be gained by her, if this court should order the judgment vacated.

We are of the opinion that the judgment of the lower court must be affirmed.

AFFIRMED.

ATTEST:



which the execution of the contract of the  
the witness (name), showing if the contract would be  
was the "time of the execution of said contract" (name)  
and agreement as to the child's "time to execute"  
a period of two years; and if the time, as well as the  
all other provisions. Witness, the witness (name) and the

well known to the public, and the fact that the  
 authorities in very few cases of a private character  
 of course, the fact is well known that the fact is not  
 the writer's name, under seal, in a public statement,  
 but when it is stated in public to vary the fact of  
 fact of the individual in the public statement.

[illegible]

4/10/17  
Gen. No. 6553.

*April*  
~~October~~ Term, 1916.

Ag. No. 4.

James E. Johnson, Conservator of Mary  
A. Taff, Appellant.

vs.

W. O. Taff,

Appellee.

Appeal from Sangamon

Opinion by Thompson, P. J.

204 I.A. 546

In December, 1913, James E. Johnson, conservator of Mary A. Taff, filed a bill in equity in the circuit court of Sangamon county, against W. O. Taff, praying to have a bill of sale dated June 4, 1910, conveying certain personal property to the defendant, for the consideration of \$1000 in hand paid, and a lease dated December 16, 1911, by which Mary A. Taff leased to the defendant, 140 acres of land from March 1, 1914, to March 1, 1919, for an annual rental of \$500 the first payment of \$500 to be made January 1, 1914, and similar payments on the first of January of each year thereafter.

The bill alleges that in October, 1913, James E. Johnson was appointed conservator of the person and estate of Mary A. Taff, by the probate court of Sangamon county; that at the time of executing the said bill of sale and lease, Mary A. Taff was not of sound mind but was in her dotage and her mind and memory were so impaired that she was incapable of transacting ordinary business and that the said W. O. Taff "resorted to falsehood and misrepresentation to induce the said Mary A. Taff to execute the said instrument and that the said Mary A. Taff was under improper re-

(Page 1)

straint and undue influence," and that the rent reserved is inadequate and only a small part of the rental value of the premises. That possession of the personal property described in the bill of sale remained with Mary A. Taff until about the time the conservator was appointed, and that the consideration mentioned in the bill of sale has never been paid.

The answer of the defendant admits the conservatorship of James E. Johnson and the making of the bill of sale and lease, but denies the other allegations of the bill and asserts that Mary A. Taff was at the time alleged and still is perfectly competent to manage her business.

The cause was referred to the master in chancery to take the evidence and report it with his conclusions. The master reported that the evidence fails to show that Mary A. Taff was incompetent to transact ordinary business at the time of the transactions, and that the bill should be dismissed for want of equity. Objections

1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 26

to the findings were overruled by the master and on a hearing on exceptions a decree was entered dismissing the bill for want of equity. The complainant appeals.

The court by the decree found that Mary A. Taff, in the spring of 1909, was living with three of her children, Charles, Frank and Linda, on the farm involved; that at that time she made an agreement with her children, which involved the personal property and real estate in which her deceased husband, herself and children had an interest, under which she conveyed that part of the real estate which she owned in fee to her child-

(Page 2)

dren reserving a life estate for herself, and a life estate was conveyed to her in other real estate owned in fee by her children; that afterwards in 1909, Mary A. Taff began a suit against all her children except W. O. Taff, to set aside the agreement and deeds, but on the trial they were held valid and her bill was dismissed; that on September 1, 1908, Mary A. Taff made a lease by which she leased to W. O. Taff, the premises in controversy from December 1, 1908 to March 1, 1914, at an annual rent of \$500 per year and that Charles, Frank and Linda Taff about that time left said premises and W. O. Taff took possession and Mary A. Taff since that time has made her home with him; that on December 16, 1911, Mary A. Taff, by another indenture, leased said premises to W. O. Taff for five years beginning March 1, 1914; and that on June 4, 1910, Mary A. Taff by a bill of sale sold to W. O. Taff the personal property turned over to her in the settlement with her children, and that the sale of the personal property and the second lease were bona fide transactions and payment was made in full of the consideration mentioned in the bill of sale and of the rent reserved in the lease.

The principal contention of the appellant is that the court erred in not finding that a fiduciary or confidential relation existed between W. O. Taff and Mary A. Taff at the time of the execution of the instruments sought to be held void, and that the burden was upon the appellee to show the validity of the transactions in controversy.

(Page 3)

The bill neither directly nor indirectly alleges that any fiduciary relation existed between the parties. There is no allegation that the parties were parent and child. So far as the bill is concerned the parties appear to be complete strangers and under no obligation to each other. "Although a complainant may make out by proof





a case which entitles him to relief, yet he can have no decree unless the allegations of the bill are adapted to the case proved." 3 Encyc. Pl & Pr. 357. There is no direct allegation in the bill, nor is there any from which inferences can be drawn, which when proved will cast the burden of proof on appellee. There is also a difference between the rules applied to transfers made by a parent to a child and by a child to a parent, if the question argued had been properly raised by the pleading. "There is no presumption of law that a conveyance from a parent to a child is the product of fraud or undue influence, (*Sears vs. Vaughan*, 230 Ill. 572,) but there must be proof of fraud and undue influence in fact." *Hudson vs. Hudson*, 237 Ill. 9; *Smith vs. Kopitzki*, 254 Ill. 498.

The evidence shows that Mary A. Taff was of the age of sixty-three years in 1911, that her husband had died in 1904, leaving her and seven children surviving him; that she and her husband owned 140 acres of land jointly; that after her husband's death, she and three of the children, Charles, Frank and Linda, continued to live on and run the farm until the fall of 1908, when Mrs. Taff became dissatisfied with the way these children

(Page 4)

ren were running the farm. Appellee is a son of Mary A. Taff and at that time lived on a farm about twelve miles from his mother. When she became dissatisfied with the way Charles, Frank and Linda were running the farm she made several visits to appellee, and persuaded him to give up his farm and lease the home farm for five years at a rental of \$500 per year. After this lease was made a division of the personal property on the farm was made between her and the three children who had been on the farm with her, and she then sold her part of the personal property to appellee for \$1000, and a year afterwards, when the consideration had been paid the bill of sale was made transferring the property to him.

When the personal property was divided between the three children and Mrs. Taff, all the children but one, who was ill at the time but who afterwards confirmed and joined in the transaction, were present and deeds were made by which she conveyed to her children the fee in the half of the farm that she owned, reserving for herself, a life estate therein, and she was given the use for her life of the other half, the fee of which was in the children. After this she claimed that she did not know she had made a conveyance of the fee and



brought suit in November 1909, to set aside the deeds. The appellee took the side of his mother against the other children. That suit was decided against the mother. In December, 1911, appellee was talking of moving to Canada with some of his neighbors and to keep him with her, Mrs. Taff executed the second lease.

(Page 5)

The bill does not allege for what reason a conservator was appointed. The evidence shows that after the first lease was made in 1908, all the children considered Mrs. Taff competent to agree on a division of the personal property and after the verbal contract for the sale of the property they considered her competent to make deeds of her land to them. In 1913, Frank and others of her children, who in this suit testified she was incompetent to do business, were trying to persuade her to make a lease of the land to Frank when the first lease should expire, if appellee should not remain after that time. Their testimony is impeached by their actions. At the time they were trying to make a contract with her after the time of making the instruments assailed in this suit, she was competent to transact her business.

Mrs. Taff was a witness and her testimony, with her bank account from September 1908, to October 1913, introduced in evidence would appear to demonstrate her mental capacity. There were ten witnesses for complainant who testified that her memory and mental capacity were failing from the spring of 1910. Five of these witnesses were her children who are interested in the case, and an exhibit in evidence shows that three of these children about the time the contracts in controversy were made were recipients of her bounty to the extent of several hundred dollars. Eight witnesses, all disinterested, who lived near her and had known her for many years testified that she was mentally capable of transacting ordinary business.

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We conclude that there was no error in the finding of the court that Mary A. Taff had sufficient mental capacity to transact ordinary business at the time of the execution of the bill of sale and the second lease. There is no evidence whatever of any misrepresentation, improper restraint or undue influence. The preponderance of the evidence is that she executed the instrument sought to be declared void understandingly and of her own free will. The decree is affirmed.

Affirmed.

(Page 7)





2751  
7/17  
Gen. No. 6590.      October Term, 1916.      Ag. No. 7.

Mattie Hazel Moore Shaffer by her next friend,  
H. J. Shaffer, Plaintiff in Error.

vs.

Robert Rose and P. J. Carey, Defendants in Error.  
Mattie Hazel Moore Shaffer by her next friend,  
H. J. Shaffer, Plaintiff in Error.

vs.

Charles Nogle, Defendant in Error.  
Mattie Hazel Moore Shaffer by her next friend,  
H. J. Shaffer, Plaintiff in Error.

vs.

Steve Tucker and Samuel Aiman, Defendants in Error.

**Error to County Court  
of Champaign**

Opinion by Thompson, P. J.

On May 18th, 1914, Mattie Hazel Moore Shaffer, a minor, by her next friend H. J. Shaffer, began a suit before a justice of the peace against Robert Rose and P. J. Carey. The summons was returnable the 23rd of May. It was served on May 19th, and on May 23rd, defendants not appearing, the evidence was heard by the justice and a judgment entered against the defendants for \$25 and costs. An appeal to the county court was perfected by the defendants on the 10th of June.

On June 20th, 1914, Mattie Shaffer by her next friend began a suit before the same justice of the peace against Charles Nogle. This summons was returnable the 26th of June. The defendant was served with summons but did not appear before the justice on the return day. The case was heard on the return day and judgment entered against the defendant for \$5 and costs. The defendant perfected an appeal to the county court.

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On the 20th of June, 1914, Mattie Shaffer by her next friend also began a suit before the same justice against Samuel Aiman and Steve Tucker. This summons was returnable the 25th of June. The defendants were served with summons but did not appear before the justice. The case was heard on the return day and judgment entered against the defendants for \$20 and costs. The defendants perfected an appeal from that judgment to the county court.

In the county court, by agreement of the parties, the three suits were consolidated and tried together. The court instructed a verdict in each suit for the defendants. The plaintiff prosecutes a writ of error to this court and by agreement the three cases are heard on the same record.

The evidence shows that plaintiff, who is fourteen



years of age owns two acres of land 237 feet in length north and south. The land owned by plaintiff was surrounded by a fence. There is a public highway along the north side of plaintiff's land. Plaintiff lived with H. J. Shaffer, who is her step father, on some adjoining land. He had sown her land to wheat in 1914. She was to get one half the wheat raised as rent. The fence on the south side of the road north of the wheat was a post and wire fence. The controversy appears, from statements of counsel, to have arisen over the question as to whether or not there is a roadway over the east side of plaintiff's land from the public highway on the north of it to some tracts of

(Page 2)

land south of plaintiff's land, but no evidence was offered concerning the claim of defendants.

The suit against Cary and Rose is to recover damages for removing two fence posts and tearing down about 60 feet of the east end of the fence on the north side of plaintiff's land and placing the fence so removed on plaintiff's land just south of the remaining fence.

The suit against Tucker and Aiman is for damages claimed because of the cutting two swaths of wheat or 29 sheaves, four or five days before it was ripe, on the east side of plaintiff's land and the carrying away of the wheat after they were forbidden by plaintiff to go on her land.

The suit against Nogle is for damages for passing with an automobile several times over the land, from which the wheat had been cut.

Rose and Cary are highway commissioners. Aiman is the owner of land immediately south of the track owned by plaintiff. Nogle is the owner of land south of Aiman. Tucker is a tenant of Nogle.

The court directed a verdict for the defendants. Plaintiff's witnesses testified that Shaffer cut his wheat on plaintiff's land the second or third of July and that the wheat was cut by Tucker and Aiman four days before that time. The evidence is that Nogle drove over the land with the automobile after the wheat was cut. The evidence of plaintiff and her witnesses is that the fence was torn down by Rose and

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Carey about the middle of June.

Counsel for plaintiff in his argument contends that it was "about the first of July," when defendants Aiman and Tucker cut the wheat and that it was "sometime in the early part of June 1914, and before the maturity of





the wheat that the defendants Carey and Rose came upon the premises of the plaintiff and were in the act of tearing downpart of the fence," etc.

It is strange that plaintiff could foresee that the defendants contemplated certain acts and brought her suits against them before the justice of the peace before the acts had been committed. The record gives the dates upon when the suits were begun, the evidence in the county court fixes the times when the acts which caused the injuries were committed. The times fixed by all the witnesses are all subsequent to the respective trials before the justice of the peace. Parties however, ordinarily, can only be held responsible for acts of omission or of commission and not for acts in contemplation. The contention of defendants is fairly presented by their counsel, that the damages, to recover for which the suit is brought, were all done subsequent to the beginning of the suits. Counsel for plaintiff does not either in his original argument or his reply make any explanation of the evident errors which must be either in the dates in the record or the dates fixed by the evidence of the witnesses.

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If the plaintiff could foresee that defendants were going to trespass on her land and do damage, she ought to be able to foresee that, if she brought suit before the damages had been done, the court would not sustain her actions if they were brought before the rights of action had accrued. The gift of prophecy would have foretold the result of the suit as well as the injury to be done.

The trial court could not do otherwise than direct a verdict for defendants in that state of the record. The judgments are affirmed.

Affirmed.

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707  
Gen. No. 6596.

October Term, 1916.

2753  
Ag No. 10

Nordyke & Marmon Co., Defendant in

Error

vs.

A. H. Drysdale, Plaintiff in Error.

204 I.A. 55  
**Error to Macon.**

Opinion by Thompson, P. J.

The Nordyke and Marmon Company brought suit against A. H. Drysdale before a justice of the peace. An appeal was taken from the judgment before the justice to the circuit court. The case was heard in the circuit court without a jury and judgment rendered for plaintiff for \$131.80, to review that judgment defendant prosecutes this writ of error.

The defendant does not deny the claim of plaintiff that he is indebted to it for \$131.80 for automobile parts shipped to him by plaintiff. The defendant filed a notice of set off in which he claims to have deposited \$300 with the plaintiff and insists that plaintiff is indebted to him in the sum of \$168.20, after deducting from the deposit the claim of plaintiff.

The plaintiff made a contract with the Illinois Motor Car Sales Company, hereinafter called the Sales Company, giving the Sales Company the exclusive right to sell Marmon automobiles in Macon and thirteen other counties in Illinois. The Sales Company agreed not to sell any other kind of automobiles and was to receive a commission of twenty-five per cent on each car sold. The Sales Company agreed to deposit with plaintiff

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\$65 for each car ordered. It gave an initial order for ten cars and deposited \$650, the cars to be shipped only as subsequently directed. The plaintiff agreed to refer all prospective purchasers within the allotted territory to the Sales Company. After the Sales Company had secured its contract with the plaintiff, a contract very similar to the contract with plaintiff was made between the Sales Company and defendant under which the defendant secured from the Sales Company the exclusive right to sell Marmon cars in Macon county on a commission of twenty per cent. On each car sold the defendant was to deposit \$75 with the Sales Company, and he gave an initial order for ten cars and deposited \$750 with the Sales Company. The contract between the Sales Company and defendant was executed in triplicate and one copy was sent to plaintiff. The contracts show that the defendant was the agent of the Sales Company in selling cars, and the Sales Company





was not the agent of the plaintiff to receive the money deposited by defendant with the Sales Company. The contracts were separate and distinct and had no relation to each other. The contract between plaintiff and the Sales Company is a contract of sale of automobiles to the Sales Company for resale to the trade, at prices set forth in the catalogue current at the date of the order and according to the discount applying thereto. The prices are net free on board cars at Indianapolis. All orders for cars given by the Sales Company were to be accompanied by a deposit of \$65 for each car ordered, but the contract does not appear to

(Page 2)

provide when the balance shall be paid. The evidence however shows that drafts accompanied the bill of lading which had to be paid before the cars were delivered. The contract between plaintiff and the Sales Company further provides: "It is further understood and agreed that such other goods, spare parts and replacements that may be required by second party, shall be shipped and invoiced by first party on its usual terms. \* \* \* second party shall, at the time of execution of this agreement, give to first party a stock order in writing thereon, for enough motor cars to meet the estimated minimum requirement of second party's business during the current season and a similar order each season thereafter during the life of this agreement."

The contract between the Sales Company and the defendant contains the provision:— "The agent agrees to buy from the Dealer ten new Marmon cars of the following models and of the quantities indicated below. \* \* \* The agent deposits with the dealer the following sum seven hundred and fifty dollars this being a deposit of seventy-five dollars on each car, it being mutually agreed that this deposit shall be held as a guarantee of good faith on the part of the agent and shall be applied on the purchase price of the Marmon cars in the following manner \$75 on each car. \* \* \* The agent agrees to pay the dealer on receipt of sight draft with bill of lading attached or on receipt of notice from the dealer that cars are ready for shipment at the works of the Nordyke and Marmon Company, the list price as above described less the discount hereinafter mentioned

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\* \* \*. The dealer agrees to return such an amount of the deposit mentioned herein as may remain on hand over and above the net dis-



count mentioned above, at the termination of this contract upon the request of the agent." The Sales Company is the dealer mentioned in the contract.

The evidence also shows that defendant attempted to get plaintiff to make the sales to him direct:— that he preferred to do business with plaintiff direct rather with the Sales Company:— but the plaintiff informed defendant that its relations with the Sales Company were satisfactory and it would not make the change defendant desired and all the cars sold by defendant were credited to the Sales Company. The Sales Company in making its contract with defendant did not profess to be acting on behalf of plaintiff but for itself.

In February, 1915, defendant wrote a letter to plaintiff to inquire of it, whether it had any collateral of the Sales Company that he could secure in order to force a settlement for deposits of his held by the Sales Company. The Sales Company in its agreement with defendant contracted in its own name, and did not pretend to be acting on behalf of the plaintiff as its principal in entering into the contract with defendant and accepting the deposit. The defendant in the sale of cars was the agent of the Sales Company and not of plaintiff, and must look to the Sales Company for the return of his deposit. He therefore is not entitled to set off a deposit with the Sales Company against a bill for automobile parts sold to him by the plaintiff. There is no error in the case and the judgment is affirmed.

Affirmed.

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7/16/17  
2754  
Gen. No. 6609

October Term 1916

Ag. 22.

P. N. Jones,

Appellee,

vs.

Granit Live Stock Ins. Co.,

Appellant.

Appeal from McLean

Opinion by Thompson, P. J.

204 I.A. 553

P. N. Jones paid \$1500 to the Granite Live Stock Insurance Company for 10 shares of its capital stock. He began this suit to recover the sum paid for said stock and interest. The declaration consists of the common counts and a special count. The special count avers "that to induce the plaintiff to purchase and pay for the said stock the said defendant falsely represented that it was solvent, that its financial condition was sound and not impaired, and that the shares so purchased by plaintiff were fully paid and non-assessable and not then and there subject to an assessment," and that he relied thereon and that the defendant was insolvent, its capital stock was impaired and said shares were subject to assessment. Plaintiff also filed with his declaration, an affidavit stating that the suit was brought to recover money that affiant was induced through "false representations as set out in the second count of the declaration," to pay for ten shares of stock. The defendant filed a plea of the general issue. A jury returned a verdict for plaintiff for \$1585.21; the defendant appeals.

The appellant was promoted and organized as a corporation in August 1913, with a capital of \$100,000 by three men who had been operating a

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live stock insurance business. The promoters issued \$50,000 of the capital stock to themselves for the good will of their former business. When the corporation was organized they sought to sell stock to the appellee. He investigated the company at that time and said "it was too badly mixed up for him to have anything to do with it." In July, 1914, the corporation was reorganized by removing two of the promoters from the office of director, and requiring the promoters to turn back into the treasury \$35,000 of the stock taken to themselves for the good will of the partnership business. New officers and directors were put in charge of the business; one of the new directors was a Mr. Clark, a business partner of appellee. A man named Packard was employed by the corporation to sell stock at \$150 per \$100 share, of which he received \$25 for his commission. He went with one Moots, a director, to see appellee to try to sell him stock. The first visit of Packard to appellee was in July. Appellee at that time told them "nothing doing



that thing has been too badly mixed up to have me do anything with it. They said it had been reorganized and was in good fix, and I afterwards talked to Mr. Clark and it seemed to be in a different condition." At a later date appellee said he could not tell for several weeks whether he would invest as he had other deals on hand. On October 2nd, Packard and Moots made the third or fourth visit to appellee when he agreed to take 10 shares of the stock. Appellee testified that he said he didn't

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know anything about the company and wanted to know if it was all right and they said, yes, there is no promotion stock, it is all right and sound financially, the parties that had been interested in it before were out, and it was all home fellows and named the directors, and appellee said he was acquainted with them and he believed it was all right from the class of men interested. Appellee testified that he had talked with his business associate Clark about the company before he agreed to take the stock. Packard who was a witness for appellee testified that he did not say that the company was sound financially and he is corroborated by Moots.

No witness testified that anything was said about the solvency of the company or that the stock was fully paid and non-assessable. The only evidence tending to prove the alleged false representation that the financial condition of the company was sound and unimpaired, is the statement of appellee that Packard said "that its financial condition was sound," and that statement is denied by his own witness, Packard, and by the director Moots. The evidence given on the trial does not agree with or support the affidavit and special count of the declaration.

The statement of appellee when the company was organized that it was too badly mixed for him to have anything to do with it, with the repetition of this statement in July, his putting off making a subscription for several weeks; the fact that he talked about the company with

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a business partner, who was a director in connection with the statement that he was acquainted with the parties and "believed it was all right from the class of men interested in it" can lead to but one reasonable conclusion which is that he did not reply on the representations, which he alleges were made by Packard, a stranger to him, but that he invested after his own investigation.





There is no necessity for reviewing the legal question presented.

The judgment cannot be sustained on the evidence, and it is reversed with a finding of fact that the great preponderance of the evidence shows that the appellee did not buy the stock relying on the representations which he asserts were made to induce him to buy said stock. The judgment is therefore reversed.

Reversed.

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There is no reason for removing the first line  
 (1867).  
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 not only the most reliable, but the most  
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 (1867). The following is the original text.

(1867)

16/7  
2755  
Gen. No. 6612. October Term 1916. Ag. No. 25.

Eulala McCormick, et al., Appellees,

vs.

J. H. Decker, et al., Appellants.

Appeal from Shelby.

204 I.A. 554

Opinion by Thompson, P. J.

This is an action in case begun in May 1912, by Eulala McCormick, Lulu McCormick, and Nellie McCormick, minors, by their next friend, against J. H. Decker and others to recover damages for injury to their means of support under Section 9 of the Dram Shop Act.

The declaration avers in substance that beginning in May, 1902, down to February, 1910, certain of the defendants, who were dram shop keepers in premises owned by certain other defendants, with their knowledge and consent, sold and gave intoxicating liquors to the father of plaintiffs causing him to become habitually intoxicated and an habitual drunkard, and causing him to suffer from delirium tremens and die from the excessive use of intoxicating liquors on February 23, 1910. It is further averred that in consequence of such intoxication, the father of plaintiffs neglected his business, wasted his time, squandered his estate and money and plaintiffs were and have been deprived of their proper and necessary means of support.

On a trial a jury rendered a verdict in favor of plaintiffs for

(Page 1)

\$1000 on which judgment was rendered. The defendants appeal. On a former appeal a judgment for \$6000 was reversed by this court, and the cause remanded for errors of law. McCormick vs. Decker, 193 Ill. App. 451.

The evidence shows that William E. McCormick, the father of the appellees, used intoxicating liquors to such an extent that he had delirium tremens in 1906, and repeatedly thereafter until February, 1910, when he died at the age of 53 from the excessive use of such liquors. In his life time McCormick was a farmer who had inherited 400 acres of land. He was elected circuit clerk of Shelby county and then became addicted to the excessive use of liquors. At the time of his death he owned, subject to a mortgage of \$5000, 280 acres of land. After his death all the land except 40 acres was sold to pay his debts.

The contention of appellants most strenuously insisted upon is that the trial court erred in not directing a verdict in favor of appellants, because after the home-





stead and dower had been set off there was sufficient estate left to maintain appellees in a manner suitable to their condition in life until they should arrive at the age of eighteen years, and for the further reason that appellants were not conducting dram shops and did not sell intoxicating liquor to McCormick, because there were no licensed saloons in Shelbyville subsequent to May 1908, until after the death of McCormick.

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There were no legally licensed saloons in Shelbyville after May, 1908, yet after Shelbyville had voted to become dry territory, an internal Revenue Stamp was issued to one of the defendants as a retail liquor dealer from September 1, 1908 to June 1, 1909, and the defendant dram shop keepers kept their places of business open and sold drinks of some kind to McCormick which caused him to become intoxicated. It is not necessary that the intoxicating liquor should be sold in a licensed saloon to render the seller of intoxicating liquor liable for damages under section 9, of the Dram Shop Act. The statute makes every seller of intoxicating liquor liable for all damages sustained to means of support in consequence of intoxication caused by such liquor, whether such sale was lawful or unlawful. There is ample evidence, which is not disputed, that the defendants sold liquor to McCormick after May, 1908, which caused him to become intoxicated to such an extent that he suffered from delirium tremens and died in consequence of the use of such liquors.

If the income of the father or his property that would have been applied to the support of his children was reduced and used in the purchase of intoxicating liquors which caused his intoxication, and injury to their means of support was thereby sustained, the question whether their means of support were suitable to their condition in life is immaterial. *Jefferies vs. Alexander*, 266 Ill. 49; *McMahon vs. Sankey*, 133 Ill. 636; *Grove vs. Link*, (opinion 3d Dist. yet unpublished.) If the appellees have sus-

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tained injury to their means of support in consequence of the intoxication of their father, they have a cause of action against the parties who sold him the intoxicating liquor, that caused his intoxication. There was no error in refusing the preemptory instruction requested.

It is also contended that the court erred in admitting in evidence two statements of account between certain of the defendants and the deceased. The state-



ments are dated one in January 1907, the other in 1908, and are receipted by the defendants, who rendered them. They show the sale of liquors by drinks and by half pints or quarts at retail by certain appellants to the father of appellees. The accounts were rendered long subsequent to the time it is averred the defendants began selling liquor to McCormick. There was no error in the ruling of the court in admitting them.

It is argued that the first instruction given at the request of appellees is erroneous. It is in the language of the statute. The statute contains the words "for all damages sustained." These words must be construed with the prior words injured in their "means of support." The fourth instruction is concrete and concludes with the expression "the damages if any are confined to an injury to the means of support." The instructions are read as a series and the jury could not be misled by the first instruction. It is also the law that an instruction repeating verbatim the language of the statute on which a civil suit is based is not erroneous. *Reich vs. The People*, 229 Ill. 574; *Danley vs. Hubbard*,

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222 Ill. 88.

Counsel also criticise some other instructions given at the request of appellees but we are unable to find any error in any of them.

It is also insisted that the court erred in refusing two instructions requested by appellants. The instructions both direct a verdict. They both call attention to particular portions of the evidence, are misleading and argumentative, and the material legal propositions in the second refused instruction are contained in others given at the request of appellants. There was no error in their refusal.

We find no error in the record and the judgment will be affirmed.

Affirmed.

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4 70 7  
Gen. No. 6616.

October Term 1916.

2756  
Ag. 28.

Village of Brocton,

Appellant.

vs.

J. L. Wiese, Jr., Walter R. Lutterell and Wallace  
Kaericker, Appellees.

Appeal from Edgar.

204 I.A. 556

Opinion by Thompson, P. J.

This is a suit begun September 25, 1915, before a justice of the peace by the Village of Brocton against J. L. Wiese, Jr., Walter R. Lutterell and Wallace Kaericker to recover a penalty for the violation of a village ordinance. From the judgment before the justice an appeal was taken to the circuit court where on a trial a jury returned a verdict finding the defendants not guilty. A motion for a new trial was overruled and judgment rendered in favor of the defendants. The village prosecutes this appeal.

The appellant introduced in evidence an ordinance of the village, Section 57 of which provides:—"No person shall within the village limits, keep any billard table, pool table, bagatelle, pigeon hole or other tables of any kind used for similar purpose, or pin or ball alley to be used for profit or gain, without a license so to keep or use. Any person violating this section or any provision hereof shall be fined not less than one hundred nor more than two hundred dollars."

The evidence further shows that in the village of Brocton from August 1914, up to the time of filing the complaint, a pool or

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billiard room was run, under the management of some of the appellees. The room was in the business section of the village and was an ordinary room 70 to 80 feet in length and about 20 feet wide. It contained a billiard table, four pool tables with balls, racks and cues, chairs, a cash register, a cigar case and the equipment ordinarily used in public pool and billiard rooms.

Witnesses for the people testified that they played pool and billiards and paid 5c for some pool games, 10c for others and 40c an hour for playing billiards; that they made the payments sometimes to Lutterell and at other times to Wiese and the money was put into the cash register. On cross examination it was developed, that a club, called the Brocton Amusement Club, was claimed to have been organized of which Wiese was the manager, Lutterell was the janitor and clerk, and Kaericher was the president. To become a member of the club all that a person did was to sign his name to a



paper and pay 25 cents for a ticket.

The manager or clerk of the club received the 25 cent ticket at 30 cents in payment for pool or billiards and after the 25 cent ticket was exhausted they simply paid in cash the ordinary prices of 5c or 10c for pool and 40c an hour for billiards. Wiese was referred to by some of the witnesses as manager and by others as owner of the establishment. All the witnesses stated that they had no connection with the so called club. After the establishment of the so called club had been developed

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in the cross examination, counsel for appellant undertook to show that prior to August 1914, the defendants, or some of them, had conducted the room as a licensed pool and billiard hall in the same manner, except the requirement of buying a 30 cent ticket for 25 cents was not in vogue. To this offer the court sustained an objection. The defence attempted to be made by the cross examination is that the defendants were only the agents of the so called club and it is not claimed that a license had been issued either to any of the defendants or to any other person or association.

While it was immaterial what the defendants did in the management of the pool room, when they had a license, if they had one, yet that the room was run in the same manner and with similar charges as a licensed pool room by the same parties or some of them, before the so called club was organized was material, to show that the club organization was only a shift or device on the part of the defendants to avoid the payment of a license fee. *People vs. Gardt*, 258 Ill. 468; *Same Case*, 175 Ill. App. 80. However without such proof, the device is so transparent and artificial, that it is almost incredible that a jury could be found that would return a verdict of not guilty after hearing the evidence admitted. *Rickart vs. The People*, 79 Ill. 85; *People vs. Gilmore*, 273 Ill. 143; *South Shore Country Club vs. The People*, 228 Ill. 75; *People vs. Craig*, 155 Ill. App. 73.

It is argued on behalf of appellees that the money paid for the

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games to Wiese or Luttrell was for the club. If that be true, still there is no agency in violating an ordinance. All persons who aid, abet or assist in the commission of an offense are guilty as principals as there can be no agency in the doing of an unlawful act. *Pearce vs. Foote*, 113 Ill. 228; *Jamieson vs. Wallace*, 167 Ill. 388; *Auxer vs. Llewellyn*, 142 Ill. App. 265.





If the business of the club was, without a license, in violation of an ordinance, then the agents of the club who knowingly assisted in violating the ordinance are guilty as principals. The court erred in not setting aside the verdict and granting a new trial.

It is also argued that the court erred in refusing an instruction requested by the plaintiff. The abstract does not contain any instructions given at the plaintiff's request although the record shows that three were given. The refused instruction informed the jury "that one charged with a misdemeanor cannot avoid punishment by showing that all he did was done by him as the agent of another person or corporation and in this case although you may find from the evidence that the defendants or either of them only acted in the capacity of local manager or agent of the amusement company in question at the time of the alleged offence, yet if you further believe from the clear preponderance of the evidence that the said defendant or either of them were engaged in the unlawful keeping of a billiard room or pool room in violation of the ordinance in question, then whether he did it as manager or agent of such amusement company could make no difference, that when one is charged with a

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crime he cannot escape the penalty by claiming that all he did was done as the agent or manager of another person or corporation."

The instruction states the legal proposition involved correctly but in rather an argumentative form. It should be made applicable to the case and the argument omitted.

It is contended that three instructions given at the request of the defendants are erroneous. The only objection to them is that they do not tell the jury that a verdict might be rendered finding some of the defendants guilty and other not guilty, that the inference to be drawn from the defendant's instructions is that all the defendants must be found guilty jointly or all not guilty. The first instruction given for the appellant told the jury that it might find against the defendants or one or more of them. The instructions of appellees if read alone are misleading but when read as a series with appellants instructions, the jury could not fail to understand that they might find some appellees guilty and others not guilty as the evidence might justify.

The appellant tried the case on the theory that the fine, if any, assessed against the defendants should be a



several fine against each as appears from the form for a verdict requested by them, that if the jury find for the plaintiff the form of the verdict may be, "we the jury find the issues for the plaintiff and against the defendants and assess the plaintiff's damages at the sum of ..... Dollars each (here inserting

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the amount of not less than \$100 nor more than \$200 for each defendant as you may from the evidence determine.") If this instruction had been given and the jury had found the defendants guilty the combined fines in this suit could not have been less than \$300 or an amount beyond the jurisdiction of a justice. This is not a suit against them severally but jointly, and like any other tort they could find against any one, two, or all three of the defendants or in favor of any one or more of the defendants as the evidence justified. It would have been error to render judgment for a sum against each defendant severally, but it must be a judgment against such defendants, if any, as were found guilty jointly. Jacksonville vs. Holland, 19 Ill. 271; Indiana Millers Mutual Fire Insurance Co. vs. People, 170 Ill. 474; 65 Ill. App. 355. The court did not err in refusing the instruction as to the form of verdict requested by appellant and the instruction given by the court on its own motion was proper.

The judgment is reversed and the cause remanded because the judgment is against the clear preponderance of the evidence.

Reversed and Remanded.

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4/16/17  
2757  
Gen. No. 6619.      October Term, 1916.      Ag. No. 31.

W. H. Cline,

Appellant.

vs.

City of LeRoy,

Appellee.

Appeal from County Court  
McLean County.

204 I.A. 558

Opinion by Thompson, P. J.

This is a suit brought by appellant against appellee to recover under section 256 of the Criminal Code, three fourth of the damages to property averred to have been injured or destroyed by a mob on the 19th of October, 1914. The declaration contains two counts, each of which make the averment necessary to recover under the statute. Appellant presented an itemized account of the damages claimed to have been sustained, some of which are, paint on house \$20, glass broken \$8.25, two cherry trees cut \$5, apple tree cut \$25, water wasted \$1.75, with other items amounting to \$126.

The jury returned a verdict for the appellee on which judgment was rendered. The only serious contention of appellant is that the verdict and judgment are against the manifest weight of the evidence and a new trial should have been granted.

The evidence shows that appellant, who was about the age of 70 years, owned and occupied a residence in the City of LeRoy. He had recently celebrated his second marriage. On Monday evening, the 18th of October, while appellant and his wife were attending a church service, a crowd of some 70 people assembled about his residence. The appellant and his

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wife seeing the crowd assembling did not go home but went to a neighbor's house. The crowd then went to the neighbors house but upon being requested by the neighbor to go home, it quietly dispersed. The appellant appears at that time "to have set up the cigars to the boys."

The next evening about 7:30 a large crowd, estimated at from 150 to 300 persons, congregated about appellant's residence. The crowd made various kinds of noises, such as shouting, pounding on the house, hammering on circular saws hung on trees in the yard and firing guns. It also built a fire in the street with lumber taken from appellant's lot and burned his lawn mower. Bricks are said to have been thrown through the windows and an old pump was broken and thrown into a dry well. A garden hose was attached to a city water faucet and water thrown over and about the house and mud was plastered on the porch.



The appellant has very much exaggerated his damages. He testified first that he paid \$18.25 or \$18.50 for replacing broken glass, on cross examination he reduced the mount to \$8.25. His claim for repairing the damage to the paint was \$20. He paid the painter \$3. For damage to the apple tree his claim is \$25, the evidence shows a limb was cut off which did little damage. The damage to the cherry trees he fixed at \$5, all the damage done was a little scratching on the bark by the teeth of the saws being knocked against the trees. Concerning his claim of \$1.75 for water wasted, the evidence shows that for the three

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months, which covered October 19th, appellant's water bill was \$1, being the minimum charge while the price for the water actually used during that three months was only 65 cents. The appellant so exaggerated his damages that the jury did not believe anything testified to by him.

The proof, however by other witnesses as well as by appellant, is that he tried to telephone to the city marshall, and not being able to get him, he told the manager of the telephone what was going on, and asked him to tell the city marshall that "they were tearing up everything." The city, which has a population of about 1500, only has one police officer on night duty and he is known as the city marshall or night watchman. The city marshall was attracted to appellant's residence about 8:30 by the noise; he testified that he went there at that time and found about 300 people there, hollering in the yard and about the house, etc., and that he stayed around for some time; that he told them to leave and part of them did go away. The marshall only stayed a short time and then went away leaving the charivari party in action; he went back again about ten thirty o'clock. He knew that appellant had been trying to telephone to him. The city mayor was informed that evening by his children that they were going to a charivari party. The mayor took no steps to stop the riotous preformance. The appellant fired a small 22 rifle several times into the ground or over the trees trying to scare the crowd, but the crowd had a band engaged who played "silver threads among the gold." The evidence also shows that some of the

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crowd had a gun or guns which were fired off. The appellant was in his house with his wife in a closet in terror.

"The charivari party consisting of the crowds in





front of and upon the defendant's (appellant's) premises constitute an unlawful assembly; and by their transactions, conduct and behavior became what is known in law as a 'riot' tending to the disturbance of the peace and the annoyance, if not the terror, of the defendant and others in the vicinity." Higgins vs. Monaghan, 78 Wis. 602. "Every good law-abiding citizen must and does condemn such unlawful and riotous assemblies (charivaris). They are wholly indefensible in law and morals, and are reprobated by every well-disposed person." Gilmore vs. Fuller, 198 Ill. 130.

The preponderance of the evidence shows that the appellee used all reasonable diligence on his part to prevent damage to his property. He notified the marshall, who already knew of the riotous proceeding, and the city officials did nothing to protect appellant's property from damage after they were advised of the charivari or riot. Appellant threatened the crowd and told them he was trying to get the city marshall and parties in the crowd said the marshall and mayor were behind them. The marshall, who was notified by the telephone manager that appellant wanted him, said that he supposed appellant wanted him to get the crowd away. Some damage was done by the riotous crowd to

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appellant's property.

The verdict and judgment are against the manifest weight of the evidence and the court erred in not granting a new trial.

Appellant also contends that the trial court should have instructed a verdict for him. The defence urged is that appellant did not "use reasonable diligence" to prevent the damage. There is some evidence tending to support that contention. Where there is evidence tending to support the contention of both parties the trial court cannot instruct a verdict. Libby McNeil & Libby vs Cook, 222 Ill. 206; Eblin vs. American Car Co., 238 Ill. 176; Brophy vs. Illinois Steel Co., 242 Ill. 55; Bushway, 242 Ill. 441.

The judgment is reversed and the cause remanded for the reasons indicated.

Reversed and Remanded.

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2759  
Gen. No. 6626. October Term, 1916. Ag. No. 37.

Harriet R. Miskell, Appellee,

vs.

John Murray, Appellant.

Appeal from Vermilion

204 I.A. 567

Opinion by Thompson, P. J.

This is an action seeking to recover damages for an alleged breach of promise of marriage. The defendant filed pleas of the general issue and special pleas averring that at the time of the alleged promises, the defendant was a married man and that plaintiff had knowledge of that fact. A jury returned a verdict for \$2500.00 in favor of plaintiff, on which judgment was rendered.

The undisputed facts are that the plaintiff had been married twice before. She secured a divorce from her last husband in 1910, in Texas, where she had resided about two years. She had lived in Danville 32 years and had known the defendant 14 years. Their relations had been very friendly. In the early part of 1911, she lived in and ran a house of prostitution, on Main Street, in the city of Danville. In the spring of 1911, she moved to 24½ Washington Avenue, where she ran a house of prostitution over a saloon run by the defendant. The defendant had been divorced from his wife, Ellen Murray, but had been remarried to her in the fall of 1910. The plaintiff and the wife of defendant were so intimate that they corresponded with each other when plaintiff lived in Texas. The wife of defendant died December 13, 1915. This suit was begun in January, 1916, over three years after the alleged making of the promises to marry. In 1911, plaintiff and a woman named Gertrude Reed were indicted in the Federal Court of Danville, and in December 1911, the women were convicted and sentenced to the Federal Prison at Lansing, Kansas, where plaintiff remained in prison until the last of December 1912. The evidence introduced, tending to prove a promise of marriage, is that of the plaintiff and Mrs. Simpson, a sister-in-law of plain-

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tiff, with 71 letters written to plaintiff for the defendant by one, W. B. Reed. Plaintiff testified that defendant promised to marry her in 1911, just before she moved over his saloon and while she was in the county jail and that the promises in the jail were in the presence of several parties who could have heard them. Mrs. Simpson, in her evidence in chief only testified that defendant came to her house while plaintiff was in prison at Lan-





sing to get her to buy some things for plaintiff and he said he was going to make her happy. She did not mention the question of marriage in her examination in chief, but in her cross-examination she said plaintiff said, when she came home, he intended to marry her and make her happy. The letters were written by Reed, who testified that "he framed the sentiment and the literary excellence." When writing one of the letters Reed asked defendant "Jack did you make her any promise before she went away?" and defendant replied, "You know I am married don't you?" None of the letters contain any reference to a possible marriage between the parties but the contents are such as might be expected between parties with the record of the parties to this suit. There is neither any evidence showing that mutual promises were made by these parties nor that she accepted his promise.

When the plaintiff moved over the saloon of defendant in 1911, she desired to buy the furniture in the rooms. It was owned by the wife of the defendant and she would not sell it to plaintiff. The defendant got another woman to go and buy the property from defendant's wife for her. The proof also shows that the wife of defendant was running a hotel in Danville, where defendant ate with his family and slept during 1911, and the plaintiff was there frequently at meal times and saw the association of defendant with his wife, during the time the promises are alleged to have been made except while plaintiff was in prison.

The defendant denied ever having made to plaintiff any promise of marriage. Eight witnesses, who are disinterested, testify to

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various statements of the plaintiff that she knew defendant had remarried his former wife. All the witnesses, who plaintiff named as having heard the promises of marriage, denied having heard any conversation about marriage between the parties.

Without further reviewing the evidence, the preponderance appears to be that no promise of marriage was made between these parties and the evidence shows by a clear preponderance, and even beyond a reasonable doubt, that the plaintiff had knowledge during all the time within which she states the promises were made, that the defendant was a married man living with his wife.

A contract of marriage between parties, one of



whom is married to another party, and known to be so by the parties, is unlawful and cannot be recognized in a court of justice. Paddock vs. Robinson, 63 Ill. 99; R. C. L. Sec 4, page 145. It is unnecessary to review the other questions argued. The judgment is reversed with a finding of fact, that plaintiff at the time the alleged promises (if any) were made, knew that the defendant was a married man living with his wife.

Reversed.

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Mrs. Horace A. Smith, Appellee,

vs.

St. Paul Fire and Marine Insurance  
Company,                      Appellant

**Appeal from Edgar**

Opinion by Thompson, P. J.

204 I.A. 575

The appellee, in an action of assumpsit brought to recover on a fire insurance policy issued by appellant company, on a trial before the court without a jury, recovered a judgment for \$612.50.

The declaration pleads the policy and the destruction by fire on December 4, 1915, of the property insured without any fault on the part of appellee; that appellee on December 4, 1915, gave notice to appellant of the loss and has performed all acts required by the policy to be done by her, etc. The appellant pleads (1) the general issue; (2) that appellee willfully caused the building to be burned and (3) that appellee neglected and refused to give appellant any notice of the loss or itemized statement of it. Replications were filed to all the pleas. The replication to the third plea avers that notice was given to one R. K. McCord, a duly authorized general agent of appellant, and that appellant sent its adjuster, one J. M. Allen, to investigate said loss and that said adjuster continued to make attempts to adjust the loss with appellee until after the time fixed by the policy for filing such notice and proofs had expired, and prevented appellant from filing the same and thereby waived the filing of proofs, etc.

The only defence sought to be made is that appellee did not give immediate notice in writing to the appellant of the loss, and did not within sixty days after the fire render a sworn statement to appellant stating her knowledge and belief as to the origin of the fire, and her interest in the property with proofs of loss.

The policy was issued by one R. K. McCord, an agent of appellant, of Paris, Illinois, and is countersigned by him. The building destroyed was situated in the village of Isabel. It was a

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frame building, owned by appellee. Part of it was occupied by her as a grocery and restaurant; the remaining part was occupied by John Slater as a meat market. The fire occurred in the early morning of December 4, 1915. Appellee, by telephone, immedi-



ately notified R. K. McCord, the agent who had written the policy, of the fire. McCord testified that he was an authorized agent of appellant, and that appellee called him by telephone the morning of the fire and said her building had burned, and wanted him to come over; he replied he did not do the adjusting for the company but would report it, and that he did; that pursuant to notice given by him, he got a letter from J. M. Allen of Decatur, an adjuster for appellant, asking him to meet Allen at Isabel to adjust this loss, and they met there on December 20, 1915, and went to the home of appellee, took measurements of the foundation, made figures and discussed the loss with her. Allen presented to appellee at that time, a "non waiver agreement" and got her to sign it. Appellant on the trial produced this agreement, which is signed by appellee and by the "St. Paul Fire and Marine Ins. Co., J. M. Allen St. A." The appellant introduced this agreement in evidence and that was the only evidence introduced by it. Appellee also introduced in evidence two letters written by Jay M. Allen to McCord in reference to appellee's loss. One is dated December 18, 1915, in which he refers to a letter of the 15 th of December, from McCord to him, about the Isabel loss, and in which Allen states that his wife has been critically ill for ten days "but you can rest assured that I will visit you shortly and get this loss settled up in some manner or other so as to get this out of our system." Another dated January 25, states that he will arrange to visit McCord within the next ten days and hopes to close up the Isabel loss. These letters are signed by Allen as Special Agent, and are upon letter heads purporting to be those of appellant. Letters from McCord to appellee were also offered in evidence stating that appellant was a good company and he would take up the matter of the loss with it immediately. The last is dated

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February 21, and in it is the statement that he has a letter from Jay M. Allen, who has been unable to leave home on account of sickness, but he assures the writer he will come just as soon as he can. There was proof also showing that there were subsequent communications between the local agent and appellee as to when the adjuster was coming.

There was also proof that appellee had had a loss by





fire about a year prior to this one, which had been covered by a policy issued by appellant and that Jay M. Allen had acted as the adjuster for appellant and had settled with appellee for that loss.

The non waiver agreement states that "it is to preserve the rights of all parties hereto, and provide for an investigation of the fire and the determination of the amount of the loss or damage, in order that the party of the first part may not be delayed unnecessarily in her business and in order that the amount of her loss and damage may be ascertained and determined without regard to the liability of the second part."

There is no assignment of error raising any question as to the evidence admitted.

The "non waiver agreement" produced by appellant and signed by it by Jay M. Allen, State Agent, is sufficient proof of the fact that Allen was the authorized adjuster of the company, even if there had not been other proof on that question. If he was an adjuster authorized to take a non waiver agreement, which appellant has adopted as its act, it cannot well repudiate his other acts in the line of an adjustment.

The non waiver agreement showed the agency of Allen to adjust the loss and the appellant is bound by the acts of such agent within the scope of his authority and notice to him was notice to the company. (Phoenix Ins. Co. vs. Stocks, 149 Ill. 319.) The acts and representations of the agent of appellant with respect to matters in his charge were the acts of the appellant. His acts were incon-

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sistent with an intention on the part of appellant to insist upon a strict observance of the conditions of the policy in regard to notice in writing of the loss, and the presentation of the proofs of loss within the time specified. Where an insurance company sends an agent to adjust a loss it is estopped to subsequently deny that it had proper notice of the loss. Home Ins. Co. vs. Myer, 93 Ill. 271. Appellant cannot be permitted to escape liability by the representation of the adjuster to the insured, that his wife was ill and he would come shortly and get this loss settled upon some manner, and thereby mislead the insured until the time for making proofs had elapsed. (Citizens Ins. Co. vs. Stoddard, 197 Ill. 330; Dwelling House Ins. Co. vs. Dowdall, 159 Ill. 179; Phoenix Ins. Co. vs. Grove, 215 Ill. 299.) The evidence fully sustains the judgment and it is affirmed.

Affirmed.

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2763

**Gen. No. 6639.      October Term, 1916.      Ag. No. 49**

Mary M. D. Cory,      Appellant,

vs.

Charles W. Pullen, et al., Appellees.

204 I.A. 590

**Appeal from Montgomery.**

Opinion by Thompson, P. J.

This is a suit begun by Mary M. D. Cory to foreclose a mortgage. The bill alleges that on February 12, 1910, Charles W. Pullen and Stella Tratt Pullen, his wife, executed a note payable to the order of Henry R. Crawford for four thousand dollars due five years after date with interest at the rate of six per cent per annum payable annually as evidenced by coupon notes, which said notes were a few days after they were executed, purchased by complainant and assigned to her by Crawford, and that she has been the owner in exclusive possession of them ever since such assignment; that on February 12, 1910, the said Pullens executed a mortgage on three described parcels of real estate containing 100 acres in Montgomery county, which was duly recorded on February 16, 1910; that said four thousand dollars with interest from February 12, 1915, is now due complainant; that on December 15, 1911, while said note and mortgage were in the possession of complainant, Henry R. Crawford wrongfully and fraudulently, without the knowledge of complainant executed a release of said mortgage and caused the same to be recorded and to conceal his fraudulent acts paid to complainant the interest coupons as they became due; that said pretended release is a cloud on complainant's title. The bill alleges that Charles O. Swart, George A. Neisler, W. E. Morain and James M. McGee have or claim some interest in said mortgaged premises or part thereof as purchaser, mortgagers or judgment creditors, which interest, if any, is subject to the mortgage of complainant.

The prayer of the bill is that an account be taken, and that Charles W. Pullen, Stella Tratt Pullen and Henry R. Crawford be decreed to pay complainant the sum found to be due, and in default of

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payment that the mortgaged premises be sold and that all persons claiming under them be foreclosed; that the said release be declared void and that complainant have execution against Charles W. Pullen, Stella Tratt Pullen and Henry R. Crawford for any balance remaining due complainant, and for general relief. It makes Charles W. Pul-



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Swart, George A. Neisler, W. E. Morain and James M. McGee parties defendant.

Answers were filed by the defendants Neisler, Morain, Charles W. Pullen and Stella Tratt Pullen. Charles W. Pullen and Stella Tratt Pullen also filed a cross bill praying that should a decree be entered on the original bill, then that Swart be decreed to be the principal debtor. The cross bill is however shown by the decree to have been withdrawn. Swart, McGee and Crawford were served with summons but did not answer, and the record does not show that any order of default was entered against any of them.

J. W. Bechtold, also by leave of court, intervened and filed an answer in the nature of a cross bill, denying any right of complainant in the original bill to a foreclosure and setting up his rights under two notes for \$1,000 each and a mortgage made by Neislars to W. E. Morain on ninety acres of the premises described in the Crawford mortgage.

The evidence was heard in open court and a decree entered dismissing the original bill. The complainant appeals.

The following facts are shown by the record. On February 12, 1910, Charles W. Pullen was the owner of certain real estate in Montgomery county. On that day he and his wife, Stella Tratt Pullen, executed a note for the principal sum of \$4,000 payable to the order of Henry R. Crawford at his office in Hillsboro, in New York exchange, five years after date, with interest at the rate of six per cent per annum payable annually as per coupon interest notes attached. A mortgage on an eighty acre tract and two ten acre tracts of land owned by Pullen was also made by Pullen and his wife

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to Henry

R. Crawford securing the payment of said notes, the mortgage, however, does not state where the notes are payable. There is no provision for the payment of the principal note before the time of its maturity. The mortgage was duly recorded on February 16, 1910. On March 17, 1910, appellant bought the notes from Crawford, and he endorsed the principal note and delivered the notes and mortgage securing them to her. Since that time, she has been the owner and had exclusive possession of the principal note and the mortgage securing it. No written assignment of the mortgage was made. Each year when the interest became due appellant took the note with the attached coupons to



Crawford's office, received a check from him for the interest due, clipped off the interest coupon due and delivered it to him. When the last coupon note matured, appellant took the principal note with the interest coupon to Crawford's office and collected the interest but nothing was said about the payment of the principal.

On September 19, 1910, the Pullens sold and conveyed the real estate that was covered by the Crawford mortgage to C. O. Swart, subject, however, to the \$4000, mortgage and to a second mortgage of \$1000, with the interest accrued on them, and the taxes\* assessed in 1910, all of which the grantee assumed.

In the fall of 1911, George A. Neisler, desiring to buy the eighty acre tract and one of the ten acre tracts of land mortgaged by the Pullens to Crawford, asked W. E. Morain, a dealer in real estate, who lived at Irving a village about eight miles northeast of Hillsboro, near the land in question, what would buy 90 acres of the Swart land. Swart lived at Decatur. Morain entered into correspondence with him for the purchase of the land for Neisler, which resulted in Swart agreeing to sell and convey to Neisler the eighty acre tract and one ten acre tract for \$5000 free and clear of all incumbrances, except some mineral rights reserved in the

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Pullen mortgage and deed. Swart furnished Morain with abstracts which showed a satisfactory title, subject to the \$4000 mortgage to Crawford and a second mortgage for \$1000 to John Tratt, and Morain so advised Neisler by letter. It was arranged by correspondence that the parties should meet in Hillsboro, on December 15, 1911, to close the deal. On the day they were to meet, Swart got to Hillsboro first and went to Crawford's office and procured from him a release of the Pullen mortgage. The release is executed by Crawford and purports, in consideration of \$1.00 and other good consideration, to release all interest in the land covered by that mortgage. Morain was passing along the street, and Swart, coming out of Crawford's office, called to Morain that he had the deed and releases for the two mortgages and showed them to him. They stepped into the front of Crawford's office and Morain wrote and delivered to Swart a check for \$4,889.34, and Swart delivered the two releases and the deed to Neisler. Morain had the releases and the deed to Neisler recorded. The deed to Neisler conveys to him the 80 acre tract and one of the ten acre tracts. It is dated December 12, 1911, was acknowledged December





14, 1911, and was recorded December 15, 1911. The release by Crawford is dated and acknowledged December 15, 1911, and was recorded at the same time as the deed to Neisler. Morain had no conversation whatever with Crawford, and Neisler testified that all he did in the purchase of the land was done through Morain and that he was not in Crawford's office.

Swart testified that he procured the release from Crawford and that Crawford talked like he owned the mortgage, and required him to pay interest up to the next interest paying time, but said if he succeeded in loaning the money before that time he would refund the interest saved.

Neisler and his wife executed a mortgage to Morain covering the real estate that he had bought from Swart. The mortgage is

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dated December 12, 1911, was acknowledged December 13, and recorded with the Neisler deed. It was made to secure a principal note for \$3000, payable to the order of Morain five years after date. This mortgage was made after the sale to Neisler had been agreed upon and was to be effective, if the deal should be closed and was for part of the purchase money that was loaned to Neisler by Morain.

On December 13, 1912, the Neisler note with the mortgage recorded December 15, 1911, was taken up and a new mortgage, securing three principal notes each for \$1000 payable to the order of Morain five years after date, with coupon interest notes attached, was executed to take the place of the first mortgage. This change was made to accomodate Morain so that he could more readily put the notes on the market. One of these notes had been paid, the other two were transferred by endorsement for value to J. W. Bechtold on March 11, 1915.

Henry R. Crawford was not authorized by appellant either to receive payment of the \$4000 note, which he had endorsed to her, or to release the mortgage securing it. She did not learn until about Christmas, 1915, that a release had been executed. On learning that fact, she immediately began this suit.

The only question presented and argued in this cause is whether the release executed by Henry R. Crawford of the mortgage given to him by Charles W. Pullen and his wife is void as to the Pullens, George A. Neisler, the present owner of part of the land covered by the mortgage to Crawford and J. W. Bechtold the



present owner of the notes and mortgage given by Neisler to Morain and by him assigned to Bechtold.

The case is the outgrowth of a fraudulent transaction of Henry R. Crawford and must result in a loss to innocent parties unless the note can be collected from Crawford. It is contended on behalf of appellant that Swart, Neisler and Morain, his agent, were negligent in not demanding that they be shown the Pullen note and mortgage,

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when the release executed by Crawford was delivered to them by Swart. Neither Swart, Neisler or Morain had any knowledge or notice that Crawford held transferred the note made by the Pullens. Abstracts of the records were required to be furnished, when Swart bought the land from Pullen and when Neisler bought from Swart. Swart bought the land from Pullen, subject to the payment of the Crawford note and mortgage, and agreed to sell it disencumbered of all mortgages. Neisler received a deed from Swart with a release of the mortgage to Crawford against the property duly executed. Crawford was the only party lawfully authorized to execute the release so far as appeared from the records. Neither Neisler or Morain had any talk with Crawford, nor had either of them any occasion to make any enquiry concerning the right of Crawford to make the release. He was the mortgagee and the payee named in the note. He, so far as anything appeared on the record, had the right to receive payment of the note before its maturity and release the mortgage, whenever the mortgagor or his grantee should pay his demand therefor. There is nothing appearing in the evidence which would excite in the minds of Neisler or Morain the least suspicion of the rascality of Crawford or that the transaction was not straight. Neither Neisler nor Morain were in any way negligent, while appellant was negligent.

The law is well settled in this state that the trustee, in a trust deed of the character of the one in question, has the power as to third parties to release the lien created thereby so as to reinvest the title in the grantor, even though he does so without the consent of the holder of the indebtedness which the trust deed was given to secure, and in violation of the obligations of the trust. (Mann vs. Jummel, 183 Ill. 523,) and such release may be made even though the indebtedness secured by the trust deed is not due at the time the release is executed. (Ogle vs. Turpin, 102 Ill. 148.)" Vogel vs. Troy,





232 Ill. 481; Williams vs. Jackson, 107 U.S. 478.

"Public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security,

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unless he has notice or is chargeable with notice of some title, claim or conveyance inconsistent therewith." "In the absence of any notice or ground of suspicion it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record." Lennartz vs. Quilty, 191 Ill. 174; Ogle vs. Turpin, (Supra;) Mann vs. Jummel, (Supra.)

A mortgage securing the payment of a note is but an incident to the debt. Whatever is sufficient to transfer the title to the debt will also transfer the mortgage in equity, and the mortgagee will hold the title for the assignee of the debt. "A mortgage is as effectually assigned by a transfer of the mortgage indebtedness without any indorsement upon the mortgage as with it. Fountain vs. Bookstaver, 141 Ill. 467. An assignment of a mortgage does not convey or transfer the legal ownership, the right acquired by an assignment is only an equitable one. Sanford vs. Kane, 133 Ill. 199. Bartholf vs. Bensley, 234 Ill. 336.

One purchasing notes and a trust deed securing them must give notice to the grantor if he desires to preserve his rights under the trust deed against payments made to the former holder. Napieralski vs. Simon, 198 Ill. 384.

The assignee of a note is at fault in failing to give notice of the assignment of the note to him. "The equitable assignee to protect his rights against a payment by the mortgagor to the mortgagee must give the former notice, actual or constructive, of its assignment, and failing to do so is negligence." Towner vs. McClelland 110, Ill. 551; Napieralski vs. Simon, (Supra;) Gemkow vs. Link, 225 Ill. 21; Edgerton vs. Young, 43 Ill. 464.

The appellees, Pullen, in making the conveyance to Swart were guilty of no negligence in conveying the real estate subject to the payment of the encumbrance. Swart by accepting such deed assumed the payment of the mortgage debt. He by his assumption of the mortgage debt, became the principal debtor and Pullens were only sureties.

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(Schultz vs. Sroelowitz, 191 Ill. 249, at



page 255.) The property became the primary fund for the payment of the debt. (*Drury vs. Holden*, 121 Ill. 130; *Schultz vs. Sroelowitz*, (Supra.) Neisler was not guilty of any negligence in accepting the deed with the release from Crawford, the mortgagee; neither was Bechtold in any condition different from Neisler.

If appellant had taken an assignment of the mortgage and had it recorded, she would thereby have given notice that would be binding upon all parties, who might subsequently become interested in the property, and any rights that they might acquire would be subject to the rights of appellant. "To be protected the assignee must omit no duty nor fail to exercise every precaution which prudence demands of all men acting in reference to matters of moment." (*Buehler vs. McCormick*, 169 Ill. 269; *Walker vs. Demart*, 42 Ill., 272.) Appellant was negligent in not taking and having recorded an assignment of the mortgage. The property was sold for more than sufficient to pay the note held by appellant so that she can have no claim against the original mortgagors. The equities of the Pullens, Neisler, Morian and Bechtold are superior to those of appellant, and there was no error in the decree in dismissing the bill as to such defendants, and refusing to set aside the release as to the land conveyed to Neisler.

As to Swart a different rule appears to apply. "The rule requiring the assignee of a mortgage securing notes endorsed in blank to give notice, actual or constructive, in order to protect himself against payments by the mortgagor to the mortgagee does not extend to subsequent purchasers of the property, who assume and agree to pay the encumbrance, and notwithstanding the assignee has not recorded the assignment or given notice thereof to anyone, he is entitled to protection against payments made by the purchasers to the mortgagee in the belief that he still owned the indebtedness." *Schultz vs. Sroelowitz* (Supra;) *Stiger vs.*

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*Bent*, 111 Ill. 328; *Lennartz vs. Quilty*, (Supra;) *Kenahane vs. Smith*, 97, Ill. 156; *Fortune vs. Stockton*, 182 Ill. 454. Appellee, McGree does not appear from the record to have had or to claim any interest in the property in litigation and the bill does not contain any allegations under which a judgment for a deficiency can be rendered against Swart.

The court erred in not setting aside the release as to the ten acres the title to which still appears to be in Swart. The decree is affirmed as to so much of it as





dismisses the bill as to the Pullens, Neisler, Morain and Bechtold and refuses to set aside the release as to the ninety acres conveyed to Neisler and denies a foreclosure against said 90 acres, but is erroneous in not setting aside the release as to the ten acres the title to which is still in Swart and in refusing a foreclosure against said ten acres. The decree is affirmed in part and reversed in part at the costs of appellees Crawford and Swart and the cause remanded with directions to the trial court to enter a decree in conformity with this opinion.

Affirmed in part, Reversed in part and Remanded with directions.

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2764  
Gen. No. 6644. October Term 1916. Ag. No. 52.

Broadway Bank of St. Louis, Missouri,  
Appellant.

vs.

13 The McGee Creek Levee and Drain-  
age District, Appellee.

Appeal from Pike

Statement

204 I.A. 592

Appellant, a corporation organized under the laws of Missouri, filed a bill in equity against appellee, alleging that the McGee Creek Levee and Drainage District was organized in the county court of Pike county at the September Term 1905, under the provisions of an act entitled an Act, etc. for the organization of drainage districts, approved and in force May 29, 1879, commonly known as the Levee Act; that said drainage district was organized for the purpose of protecting about 11,000 acres of land from overflow by the waters of the "Illinois river" and creek waters, known as the Camp and McGee creek, by the construction of levees, ditches and the operation of pumping plants; that at the November Term, 1905, of the county court of Pike county, an order was made confirming a special assessment of benefits for constructing the original work of said district in the sum of \$123,688.93, and that the commissioners issued bonds to the amount of 90 per cent of said assessment against it, said bond issue being for \$111,000; that there remained of said assessment against the lands in said district over the bond issue \$12,688. 93; that the assessment was divided into fifteen equal installments, the first payable December 1, 1911, the last December 1, 1925; that after the assessment had been confirmed a contract was let for the original work; that before the work was completed it was ascertained that the district did not have sufficeint funds to complete the work; that a petition for an additional assessment in the sum of \$62,720 was filed under section 37 of the Levee Act; that the last named petition shows that only \$106,000 had been received from the sale of the \$111,000 bonds against the first assessment; that the original estimate for the

(Page 1)

pumping plant was \$6000, but that it will cost \$22,500; that notice of a hearing on said petition was given by posting and published under section 3 of the Levee Act; and that on the hearing on said petition, an order was made fiding that all parties owning land in the district or interested therein appeared in court or by counsel; that notice had been given as required by law; that to complete the work it will be necessary to





raise \$62,720; that the remaining 10 per cent of the original assessment is not available and money cannot be borrowed on it and all parties owning land in the district being in court in person or by counsel and the commissioners consenting, it was agreed and ordered all parties interested consenting, that said 10 per cent amounting to \$12,688.93 shall be remitted to the land owners and not be collected when it matures and falls due, except so far as necessary for the payment of the bonds and that a special assessment of \$62,720 be made upon the lands in the district.

The bill further alleges that, at the time of making the said last described order, J. E. Franklin was an owner of several thousand acres of land in said district and that at the time of making said order, he resided in Missouri and was not represented in said proceedings by counsel and was not personally before said court; that said Franklin never directly or indirectly consented to that part of the order purporting to be made by consent; that the second assessment was made and confirmed against the lands in the district and the commissioners issued and sold bonds to the amount of 90 per cent of such assessment; that before the construction work of the district was completed the funds of the district were exhausted and the district made application of J. E. Franklin to borrow \$7000 to complete the work; that the commissioners of the district under section 38 of said act filed a petition to borrow a sum not exceeding \$7000 against the original and the additional special assessments, subject to the issue of bonds, and an order was made permitting the borrowing of said sum, whereupon on Apr. 3, 1909, the commissioners issued a warrant to J. E.

(Page 2)

Franklin for \$7000 payable out of any moneys from any assessments then levied and not otherwise appropriated, with interest at 6 per cent per annum and said Franklin loaned the district \$7000 on said order and at that time said district had no other outstanding obligations except said bonds and said Franklin had no actual notice of the alleged consent order; that the warrant for \$7000 is a lien upon the original and additional assessments subject only to the payment of the bonds issued against them; that Franklin endorsed said warrant to appellant for a valuable consideration, that appellant has demanded of appellee that the commissioners collect that part of the installments of the assessments not required for the payment of bonds and pay the interest on said warrant but the commissioners insist that the warrant is not a lien on said assessments and that the 10 per cent of the



original assessment has been remitted and released except so far as it may be necessary to pay the bonds issued against said assessment; that no petition was presented to the county court of Pike county to abate any part of the original assessment as required by sections 198 and 199 of an act in relation to the abatement of assessments in Levee and Drainage Districts, and that the order purporting to abate the ten per cent of the original assessment is void and the warrant held by appellant is a valid lien against said assessment.

The prayer of the bill is that, that portion of the order abating said ten per cent of the original assessment be vacated and set aside and that the original order be declared to be in full force and the warrant held by complainant be declared a lien against the original assessment.

The appellee demurred to the bill and sets up as special causes of demurrer:— (1) a want of necessary parties; (2) that the warrant is not negotiable; (3) that no part of the warrant is due; (4) that the part of the order complained of was entered by consent of the parties interested and binding on Franklin, and (5) that Franklin had notice of the order when he accepted the warrant.

The court sustained the general demurrer and also the second,

(Page 3)

third, fourth and fifth causes of special demurrer. The appellant elected to abide by its bill and a decree was entered dismissing it for want of equity.

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Opinion by Thompson, P. J.

The bill seeks to vacate that part of the order of the county court that remits and abates to the land owners the sum of \$12,688.93, the amount that the original assessment exceeded the amount of the bonds issued against it. Section 38 of the Drainage Act gives the commissioners the power to borrow not exceeding ninety per cent of the amount of the assessment unpaid at the time the bonds are issued.

The petition for the additional assessment was filed to the June Term, 1908, of the county court. The only notice given of that petition was given by mailing, posting and publishing under section 3 of the Levee Act.

Sections 198 and 199 of the act provide for the abatement of assessments for benefits and state what proceedings are necessary to secure such abatement. The petition must be filed 40 days before the term of court at which it is to be heard. It must be verified and notice must be published once each week for four





successive weeks, the first publication being not less than 40 days prior to the first day of the term.

The petition for the additional assessment does not set up the necessary facts that section 199 requires the petition to state. It was not verified as is required by the statute. The notice given was that required by section 3 of the Levee Act, which does not comply with the notice required to be given to procure an abatement under section 199.

Appellee contends that the order of the county court finds that Franklin, the payee in the warrant, was present either in person or by attorney and is concluded by that finding. The bill alleges that Franklin was not present either in person or by counsel and that he

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had no knowledge of any application for an abatement and had no actual notice of the order of abatement when he advanced the \$7000 on the order.

This is not a collateral attack on the order of abatement but a suit in equity directly attacking the order. The order does not state that Franklin personally appeared but states that all the parties interested "appearing in open court or by counsel." Franklin is not mentioned by name, neither is any person mentioned as appearing as counsel for him. In drainage matters the county court is a court of limited jurisdiction and there is no presumption in favor of its jurisdiction in a statutory proceeding even when the attack on the jurisdiction is collateral. *Payson vs. People*, 175 Ill. 267; 23 C. Y. C. 1089. This order of abatement was made in a statutory proceeding. The statute must be literally complied with both as to the subject matter and the person, and if the petition is not sufficient to confer jurisdiction the appearance and consent of the land owners does not have that effect. *People vs. Swearingen*, 273 Ill. 630; *Aldridge vs. Clear Creek Drainage District*, 253 Ill. 251; *People vs. Sangamon Drainage District*, 253 Ill. 332; *Johnson vs. Von Kettler*, 84 Ill. 315; *Watts vs. Dull*, 184 Ill. 86; *People ex rel. Hoyne vs. Stumpf* 275 Ill. 81; 12 *Encyc. of Pl. & Pr.* 126. The county court did not, under the allegations of the bill, have jurisdiction of the subject matter to enter the order abating the assessment.

A drainage warrant is not negotiable paper, yet it may be transferred, and the assignee may maintain suit on it in his own name subject to the equities between the original parties. *Newell vs. School Directors*, 68 Ill. 514; *People vs. Brown*, 194 Ill. App. 246. No reason is presented why the present holder of the warrant may



not prosecute a suit in chancery to vacate a void order, under which the district is refusing to collect the money from which the order should be paid, if it is not required to pay the bonds.

The fact that the warrent does not state when it is payable

(Page 5)

and is not a lien on any assessment is not a ground of demurrer to the bill to set aside the order. The order can only be paid out of assessments made when it was issued. Section 38 of the Levee Act makes warrants for borrowed money a lien on the assessments, and if this warrant is ever paid it must be paid out of the excess of the assessments above the bonds. This is not a suit to collect the warrant but to declare void an order which impairs and cancels the means of paying the warrant. The other special grounds of demurrer are disposed of by the disposition of the general demurrer.

The bill does not in terms state that the appellant is a corporation. Under section 16 of the act under which appellant is organized the district is however made "a body politic and corporate" with the right to sue and be sued and facts are alleged which show it to be a corporation. It may be sued the same as any other municipal corporation. Under a cross error assigned by appellee, it contends that the property owners are necessary parties. A special assesments for benefits is in the nature of a tax against the property benefited. The corporation represents the property owners. No authority is cited showing any reason for making the property owners in a drainage district parties to a suit in equity against the district. There was on error in overruling the first ground of special demurrer.

Counsel for appellee also argue that appellant is guilty of laches, in that the order of abatement was entered in 1908, and it is said this suit was brought to the November Term 1915. There is, however, nothing in the record in this court from which it can be ascertained when the suit was begun. On pages 9 and 10 of their argument they contend that the suit is prematurely brought since it cannot be determined until 1925, how much is available for the payment of the warrant. Counsel say "If after the bonds are paid there remains a balance of those assessments uncollected and the commissioners of the district should fail and refuse to collect such remainder, it is then

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The contentions of appellee are inconsistent and evasive and therefore ineffective in equity. 1 Encyc. of Pl. & Pr. 942.

The court erred in sustaining the demurrer. The decree is reversed and the cause remanded with instructions to overrule the demurrer.

Reversed and Remanded with directions.

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2765  
Gen. No. 6645. October Term 1916. Ag. No. 88.

People of the State of Illinois,  
Defendant in Error,

vs.

Chipman Ratcliff, Plaintiff in Error.

Error to County Court  
of Adams County

204 I.A. 594

Opinion by Thompson, P. J.

The states attorney of Adams county filed his information in the county court of that county charging Chipman Ratcliff with wilfully, maliciously and without cause destroying and injuring a well and pump that was appurtenant to Hazel Dell School house in said county.

The defendant in writing waived a trial by jury and the case was heard by the court and a fine of \$3.00 imposed.

The evidence shows that John Ratcliff, the father of the defendant, was the owner of the north east quarter of section eleven in Concord Township, Adams County. He died some years ago, leaving a will which devised this land to his wife for life with remainder to his children. Hazel Dell School house is upon a half acre of land in the south east corner of the south east quarter of section two in the same township. There is, and has been ever since the school house was built, a public highway along the section line that separates the school house lot from the Ratcliff land. There is a public highway also on the east side of the Ratcliff land. There is a rough place, on the north east corner of the Ratcliff land so that it was inconvenient to fence along the line of the highway, and about twenty-five years ago, about an acre of the Ratcliffe land was not fenced from the highway. About ten years ago a fence was run diagonally across the open acre leaving a triangular half acre still unfenced. The school children used the unfenced land as a play ground. About ten years ago the school directors requested Ratcliff, the father of the defendant, to deed the unfenced land to the district.

(Page 1)

Ratcliff refused the request but gave the directors permission to sink a well on this land. There is nothing in the records of the district concerning the well. About three months before the filing of this information, the directors dug another well on the unfenced half acre without the consent of the Ratcliffs. The defendant notified the directors not to dig the last well and not to put a pump in it, and to keep off the half acre of land. The directors disregarded the notice. After they had dug the well and





placed the pump in it, defendant again notified them that he was going to fence in the land and requested them to move the pump. The directors taking no action he fenced the land and took the pump from the well and placed it on the school lot. While the directors claim that the half acre belongs to the district, the evidence shows the district has no deed to it; and until recently have not claimed any right there except with the license of Ratcliffs, while the Ratcliffs have always claimed to own the premises and paid taxes on it.

The defendant without malice and without creating any disturbance took possession of the land that belonged to the estate, after reasonable notice to the directors that the license was revoked. The well and pump were not appurtenant to the school site, but upon the land separated by a public highway from the school house lot. The judgment cannot be sustained on the evidence; it is reversed.

Reversed.

(Page 2)



10/17  
2766  
Gen. No. 6650.      October Term, 1916.      Ag. No. 55.

City of Sullivan,

Appellee,

vs.

J. T. Henry,

Appellant.

Appeal from Moultrie.

204 I.A. 595

Opinion by Thompson, P. J.

Appellant was, on December 14th, 1915, fined \$65 before a justice of the peace on a charge of having violated an ordinance of the city of Sullivan. On the day the judgment was entered he appeared in the office of the clerk of the circuit court and executed and filed a bond which purports to be a bond for an appeal from the judgment against him before the justice. He also deposited \$130 in money with the circuit clerk, who endorsed on the bond, "Approved by me upon a sum of money equal to the bond being placed in my hands this 14th day of December, 1915. Fred O. Gaddis, Clerk of Circuit Court." Proper writs were issued and served and a transcript filed in the circuit court.

In the circuit court, the City of Sullivan appeared specially by counsel and moved to dismiss the appeal because the bond was not signed by a surety. The defendant entered a cross motion for leave to file a good and sufficient appeal bond. The court thereupon dismissed the appeal.

Similar proceedings were had in cases against E. M. Watkins and Henry Lincoln. By agreement of the parties, the three cases being identical except as to the names are consolidated in this court, and are heard together and the same judgment is to be entered in each case.

The only error assigned is that the court erred in dismissing the appeal and in not granting the cross motion of appellant.

The statute provides for appeals from justices of the peace in the following language, (Sec. 115, Chapter 79, Hurd's Statute.) "The party praying for an appeal shall, within twenty days from the

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rendition of the judgment from which he desires to take an appeal enter into bond with security to be approved and conditioned as hereinafter provided in substance as follows:" \* \* \* The bond may be filed in the office of the justice rendering the judgment or the clerk of the court to which the appeal is taken. "When such bond is filed with the justice it shall be approved by him." "If the bond is filed with the clerk of the court to which the appeal is taken it shall be approved by him" and on the approval of the



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bond by the clerk he shall issue a supersedeas and summons.

Section 69 of the Justice of the Peace Act of 1872, (Sec. 179 Hurd's Stat.) provides:— "No appeal from a Justice of the Peace shall be dismissed for any informality in the appeal bond. But it shall be the duty of the court before who the appeal is pending to allow the party to amend the same within a reasonable time so that a trial may be had on the merits of the case."

The instrument filed with the circuit clerk was a bond signed by the appellant. The clerk accepted a deposit of the amount of the bond in money with instructions from appellant to hold it as security on the bond, and by agreement between the clerk and appellant the money was exchanged for a certified check. The appellant in good faith attempted to perfect the appeal and the officers authorized by the statute to approve the bond did . . . approve it on receipt in cash of the amount of the bond to hold as security for it. The bond as approved is not a full compliance with the form of the bond as given in the statute. Were it not for the form of the bond given in the statute the word security might be construed as it is ordinarily used, which would include something given or deposited as surety for the fulfillment of a promise, anything which renders a matter sure.

Section 115 of the Justice's Act directs that an appeal from a justice shall not be dismissed for any informality in the bond, and that the court shall allow a party to amend the bond within a

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reasonable time. In construing sections 115 and 179, the rule is laid down that even if a bond is defective and has been accepted and approved by the proper officer, the party endeavoring to appeal should not be prejudiced by any informality or deficiency in the bond, if he will, when objection is made, remedy the defect. Hubbard vs. Freer, 1 Scam, 467; Weist vs. The People, 39 Ill. 507; Town of Partridge vs. Snyder, 78 Ill. 519; Miller vs. Superior Machine Co., 79 Ill. 450; Horner vs. Gee, 64 Ill. 178; Wear vs. Killeen, 38 Ill. 259; Enright vs. Rehbach, 133 Ill. App. 50.

The instrument filed by appellant was a bond, and although not in compliance with the statute, the court should have allowed the cross motion of appellant to file a good and sufficient bond. The court erred in dismissing the appeal. The judgment is reversed and the cause remanded.

Reversed and Remanded.

A similar judgment will be entered in General Numbers 6651 and 6662.

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17  
2767  
Gen. No. 6658. October Term 1916. Ag. No. 61.

In the matter of the Estate of Jacob  
Brown, Deceased, Calvin J. Brown and  
Harvey R. Brown, Appellants.

Appeal from Fulton.

204 I.A. 596

Opinion by Thompson, P. J.

Jacob Brown died in Fulton county in 1894. Letters of administration upon his estate were issued to Harvey R. Brown. A widow's award of \$1710 was allowed to Priscilla A. Brown, the widow of the deceased, and various claims allowed against the estate, one being for \$3588.96 in favor of Laura J. Boyed, a relative of the present county judge. In October 1896, an order was entered discharging the administrator, and approving his report, which states that the estate had been fully administered upon. That report shows the major part of the award and the claims allowed were unpaid and that there was nothing remaining available to pay the balance of the award and claims allowed.

At the December Term 1894, in a suit for partition, a tract of three acres of land was set off to the widow as and for her homestead in a tract of land Brown had owned in his life time. The widow died in March 1913. Harvey R. Brown had moved and become a non-resident of the State of Illinois. The order approving the report of the administrator and declaring the estate settled and the administrator discharged, only had the effect of closing the account to the time of the approval of the account. It is void as to unsettled matters of the estate and does not discharge the administrator. (Hughes vs. Atherton, 249 Ill. 317; State vs. Willoughby, 218 Ill. 485.) After the death of the widow, Harvey R. Brown was removed as administrator by an order of court in 1915, because he had become a non-resident of Illinois.

Petitions were filed by two daughters and a grandson of Jacob Brown, stating that Jacob Brown owned and occupied three acres of ground as his homestead in his life time and after his death that

(Page 1)

it had been occupied by Priscilla A. Brown, his widow, until her death March 8, 1913; that said homestead is now subject to sale to pay his debts including \$1391.50 unpaid on the widow's award and requesting that Nannie E. Howe be appointed administratrix de bonis non.

The estate was transferred to the circuit court because of the interest of the county judge. Nannie E. Howe is the administratrix of the estate of Priscilla A.





Brown. Calvin Brown and Harvey R. Brown, two of the sons, appeared and resisted the appointment of any administrator de bonis non. The circuit court made an order appointing Nannie E. Howe, administratrix de bonis non. Calvin and Harvey R. Brown appeal.

The contention of appellants is that there is no estate of Jacob Brown unsettled for the reason that the widow, by a deed which appellants offered in evidence, conveyed the three acres set off to her for her homestead to Calvin Brown. If she had made such a conveyance, it would only convey her interest. It would not convey any interest of the heirs or creditors. The court did not err in refusing to admit the deed in evidence on an application for the appointment of an administrator. The court could not try the question as to the effect of a deed made by the holder of the homestead against the estate of Jacob Brown, until there was an administrator to represent the estate. It is neither disputed nor contended on behalf of appellants that the land in question was not the homestead of Priscilla Brown, assigned to her from the estate of Jacob Brown, nor that the estate has had the benefit of it. A prima facie cause for the appointment of an administrator was made out and parties claiming against the estate cannot try the right of property against the estate until the estate is represented.

The law in this state is that:— "When the widow of a decedent is in possession of premises as a homestead, which do not exceed

(Page 2)

in value \$1000, the premises cannot be sold to pay debts until the termination of the homestead estate, and that the holder of unsatisfied claims may wait until the homestead estate is extinguished before applying for a sale of the property; and such property has been sold by order of court to pay debts where more than twenty years have elapsed since the claims were allowed." *Atherton vs. Hughes*, (Supra.)

It is insisted that the court erred in appointing Nannie E. Howe administratrix de bonis non, for the reason that she is the administratrix of the estate of Priscilla A. Brown. As administratrix of Priscilla A. Brown, she was interested in collecting the balance of the award, and if there is any estate of Jacob Brown unadministered she, as a daughter, is interested in securing it and applying it to the payment of the debts of Jacob Brown, the decedent. Which of the heirs should



be the administrator was a matter in the discretion of the court and all the heirs who sought the appointment of an administrator agreed upon the appointee. The appellants did not suggest that any other person be appointed, and the court should not appoint an administrator that would follow their wishes, when they are contending that there is no estate.

The order of the circuit court is affirmed.

Affirmed.

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16/17  
2769  
Gen. No. 6669. October Term, 1916. Ag. No. 67.

S. O. Smith and T. H. Cherry, Trustees  
for the People's Bank of Girard,  
Appellees,

vs.

H. W. Knemoeller, Sheriff, Appellant

**Appeal from County Court  
of Macoupin**

204 I.A. 606

Opinion by Thompson, P. J.

This is an action of replevin brought on the 17th of February, 1916, by the appellees, S. O. Smith and T. H. Cherry, trustees for the People's Bank of Girard, against the appellant H. W. Knemoeller, sheriff of Macoupin County, to recover possession of some horses and a heifer, which had been levied upon as the property of and taken from the possession of Fred Holtje by said sheriff, under an execution against Fred Holtje (Hulcher.) The execution was issued on December 2nd, 1915, on a judgment entered by confession for \$589.90 on December 1st, 1915, in favor of H. B. Hill, against Fred Holtje. Appellees claim to be the owners and entitled to the possession of the property under a bill of sale made to them on November 28th, 1914, by the execution debtor. The property was taken under the writ of replevin.

The case was tried by the court without a jury and judgment rendered that the appellees have and retain the property replevied.

The only questions presented, that it is necessary to review, relate to whether the title to the property passed to the appellees under the bill of sale. The bill of sale on its face transfers the property to the appellees. It was acknowledged before a police magistrate in "La Salle County," on November 28th, 1914, and recorded in Macoupin county on the same day. It does not contain any provision giving the vendors the right to retain possession of the property transferred.

From the evidence of appellee, Smith, the property levied upon, with other property, was conveyed by the bill of sale as security for a debt of \$1100 owing by Holtje to the Peoples Bank of Girard of which

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appellees are trustees. Between the time of the making of the bill of sale and the levy, Holtje had reduced the debt \$750 and he had the right to pay the balance at any time so that the bill of sale was really a mortgage. There appears to be an error in the record. The venue of the acknowledgement, in the bill of sale, is stated to be La



Salle County, but a proper venue would not make the bill of sale valid against third parties.

A sale of chattels, where possession remains with the vendor, is fraudulent per se and void as to creditors, where the property is of such a nature that possession can be taken from the vendor and the property removed at the time of the sale. Thornton vs. Davenport, 1 Sdam. 295; Tisknor vs. McClelland, 84 Ill. 471; Rozier v. Williams, 92 Ill. 187; Pennywit vs. Lindsay, 162 Ill. App. 102; Trimble vs. Hunt, 169 Ill. App. 259; Jacobson vs. Patterson, 190 Ill. App. 266. There is no difference in effect between a sale made with actual intent to defraud creditors and one fraudulent by operation of law. Notice of either is only notice of an illegal transaction and not binding upon a creditor. Howell vs. D. B. Fisk Co., 52 Ill. App. 310; Sec. 26, Chapter 121 a, Hurd's Statute, (Uniform Sales Act.) The judgment of the county court is reversed and the cause remanded with instructions to render a judgment in favor of appellant and to award a writ of retorno habendo.

Reversed and Remanded with directions.

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Gen. No. 6673      October Term, 1916.      Ag. No. 70.

Henry W. Oetgen,      Appellee,

vs.

Jesse Lowe,      Appellant.

**Appeal from Schuyler**

2770  
204 I.A. 608

Opinion by Thompson, P. J.

This is a suit in assumpsit begun by Henry W. Oetgen against Jesse Lowe and George B. Christie. The declaration consists of one count which pleads a contract in writing executed by the defendants whereby, in consideration of a conveyance of twenty two and one half acres of land to defendants by plaintiff, the defendants agreed to drain and protect the remaining land of plaintiff, in a drainage district to be organized, from overflow and to pay all assessments that might be made against the other lands of plaintiff in said proposed district; that the defendants have not paid said assessments, which have been levied against the lands of plaintiff in the district so organized, for the years 1909 to 1914, inclusive, and by reason of the failure of defendants to pay said assessments, they have become liable to pay said sums to plaintiff.

Lowe filed a plea of the general issue and a plea of release. To the plea of release the plaintiff replied that he did not make a release; that there was no consideration for a release, and that the supposed release was a contract not in writing and not to be performed within a year. Issues were joined on the first two replications, and rejoinders to the third replication that it was to be performed within a year, and that is was fully executed. There is nothing in the record showing that Christie was served with process of summons, and he did not appear in the case. A jury returned a verdict for plaintiff for \$328.57 on which judgment was rendered against Lowe, and he appeals.

The evidence shows that the defendant made the agreement set out in the declaration. There are 6700 acres of land in the drain-

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age district in question, of which Christie and Lowe own about 5000 acres. Appellee had owned 80 acres within the territory of the district but had deeded 22½ acres to Christie and Lowe. In consideration of this conveyance, Christie and Lowe agreed to see that appellee's land was drained by the ditches of the district and protected from overflow by levees and to pay all assessments made by the district against his remaining land. Some years after the dis-



trict had been organized, it was found that a large amount of additional work was necessary to make the reclamation a success.

The appellant and Christie had made contracts similar to the contract with appellee with a number of other owners of land in the district.

The contention of Lowe is that he and Christie, who together owned nearly five sixths of the land in the district, would not permit the district to take action toward the necessary additional work, unless the other land owners would release appellant and Christie from the contracts made by them to pay all assessments. Lowe and Christie authorized T. J. Condit and F. J. Traut to act for them in procuring releases and making the additional improvements.

Condit testifies that "we represented to Mr. Oetgen that all these parties would cancel their contracts except that I would not be responsible for Mr. Hood or Mr. Schultz. Mr. Schultz had said he would not do so, but would consider it further. I told Mr. Oetgen I thought Mr. Schultz would finally do so, I wouldn't state that he had agreed to;" that Schultz did not agree to it; that Oetgen said he would sign the release when the others were all fixed up; that he had the releases for their signatures and that the estimate for the additional improvements was \$35,000 to \$40,000 but they cost \$80,000.

The appellee did not sign a release, and testified that the

(Page 2)

only agreement he made was to sign the release, if all the others except Hood released. In 1912, he learned that P. E. Mann, an owner of land who held a contract similar to that of appellee, had not released and had never paid any assessments. From the evidence of Condit it appears that the minds of the parties did not meet and there was no release by appellee. It also appears that appellee paid the assessments supposing the releases had been obtained as stated. The appellee produced official receipts for two of the payments. He testified to the amounts that he paid for the other years. The amount of the assessments against appellee's land was agreed upon as appears by a stipulation. The declaration does not in terms aver that appellee had paid the assessments except by inference from the averment that by the failure of defendants to pay the assessments they had become liable to pay said sums to him. The only objection that appellant made to the oral evidence





ment of the assessments by appellee was that of the best evidence. He cannot urge now that it was a variance, when it was not urged below. If a special demurrer had been filed or the objection made that it was not admissible under the pleadings, the objection would have been remedied by an amendment.

The court admitted in evidence a stipulation, that P. E. Mann would testify that he was the owner of 80 acres of land within the Coal Creek Drainage District; that Christie and Lowe contracted with him to pay the assessments levied against his land and that he never released the contract and has not paid any assessments against his land. It is argued that the court erred in admitting the stipulation in evidence because the contract could only be proved by the writing itself and the statement that "he never released" is a conclusion. The record does not contain any objection to the admission of the stipulation hence the question is not saved for review.

It is argued that appellee's sixth given instruction which tells the jury, that if the appellant fails to prove a release of the contract sued on as explained in these instructions, then ap-

(Page 3)

pellee can recover, etc. because it requires the jury to examine all the instructions to determine whether appellant had failed to prove a release. The instructions are given as a series and this instruction properly required the jury to consider all the instructions on the question of release in connection with the evidence.

It is also contended that the court erroneously modified appellant's ninth and tenth instructions. The ninth instruction as given contained the sentence "and if you further believe that plaintiff accepted said proposition **and without annexing any condition relative to other land owners, except Hood, holding similar contracts making similar releases,** and agreed to release the said Christie, etc. \* \* \* your verdict should be for defendant." The court inserted the words that are in italics. The tenth contained the same sentence and the court made a similar insertion but leaving out the words "except Hood." The instructions directed a verdict and it is not pointed out wherein the modifications are erroneous. The agent of appellant and appellee had testified to the condition inserted by the court. The instructions as asked omitted that condition. It was a material part of the agreement for the release and



there was no error in the modification. We find no error against appellant in the giving or modifying of instructions.

The finding of the jury is amply sustained by the evidence. The judgment is affirmed.

Affirmed.

(Page 4)



There was no work to be done. We had no  
even started upon the work assigned to us.

The first of the day is now finished. The  
second. The third is now in progress.

Fourth.

(Fifth)

13/17  
2772  
Gen. No. 6682.      October Term, 1916.      Ag. No. 76.

Wm. C. Bell, Administrator, etc.

Plaintiff in Error

vs.

John A. Egelhoff, et als.

Defendant in Error

**Error to Jersey**

204 I.A. 618

Opinion by Thompson, P. J.

This is a suit in equity begun by William C. Bell, administrator of the estate of John Englehoff, against John A. Egelhoff, Magdalena Groppe and Joseph Schneider, seeking to foreclose a vendor's lien on the undivided half interest of John A. Egelhoff in two hundred acres of land, that John Englehoff had conveyed to John A. Egelhoff and Magdalena Groppe, and for an accounting against said John A. Egelhoff and Magdalena Groppe. The defendants filed answers denying the allegations of the bill, except the death of John Englehoff and the conveyance alleged in the bill. The answers insist that nothing is due the estate and assert that a subsequent deed, made by John A. Egelhoff, Magdalena Groppe and John Englehoff to John Schneider and John A. Englehoff, is a release of the alleged lien. Replications were filed, and the cause referred to the master to report the evidence. The cause was heard on the report of the evidence made by the master, and a decree entered dismissing the bill for want of equity. The administrator has sued out a writ of error to review the decree.

On December 31, 1908, John Englehoff "in consideration of \$5000, the receipt of which is hereby acknowledged, mutual love and affection and of the covenants and conditions herein contained," conveyed and warranted to John A. Englehoff, a son of the grantor, and to Magdalena Groppe, a daughter of the grantor, certain described tracts of land containing 200 acres. The deed contains the following covenants:—"The grantees herein covenant" that within one year after the death of the grantor they will each pay to Louisa Wiest, a daughter of the grantor \$1000 "and that they will each pay to the

(Page 1)

grantor the sum of \$250 annually in two payments of \$125 each, payable April 1st, and October 1st, during the life of the grantor "and upon the death of said grantor, the said grantees shall be released from all further liability to any payments whatsoever." It is further covenanted that in case the grantor is unable to



meet expenses which he may incur by sickness, the grantees are to pay all just debts so incurred which he cannot meet. The grantees also assume a mortgage of \$1700 held against said real estate by John A. Shephard. "It is further covenanted and agreed that the payments herein stipulated to be paid by the grantees shall be liens against their respective interests in the land and shall draw 6 per cent interest after maturity."

On May 31, 1912, John A. Egelhoff, Magdalena Groppe and John Egelhoff, in consideration of \$21,000, in hand paid, conveyed and warranted to John A. Egelhoff and Joseph Schneider the same premises that were conveyed in the deed to John A. Egelhoff and Magdalena Groppe. John Egelhoff died January 30, 1914.

The contention of plaintiff in error is that John A. Egelhoff and Magdalena Groppe were to pay the \$5000 mentioned as the consideration paid, in the deed dated December 31, 1908, and the \$250 to be paid annually by each of them to John Egelhoff and that they have not paid said sums and that the lien reserved for the payments stipulated to be paid should be foreclosed. The contentions of defendants in error are (1) that the \$5000 mentioned was not stipulated to be paid (2) that the lien of any sums to be paid by the grantees in the deed of December 31, 1908, was released by the deed dated May 31, 1912, and (3) that they have paid all sums agreed to be paid.

The deed to John A. Egelhoff and Joseph Schneider executed by John Egelhoff joining with John A. Egelhoff and Magdalena Groppe on May 31, 1912, is in effect a release of all liens for any sums whatever to be paid by John A. Egelhoff and Magdalena Groppe to John A. Egelhoff. Egelhoff clearly had the right to release the lien for

(Page 2)

any moneys to be paid him, and there is no allegation that there was any fraud in the transaction or any prayer that the release be set aside.

Prior to December 31, 1908, there had been a suit for separate maintenance brought by the wife of John Egelhoff against him and in the settlement of that suit he had conveyed the home farm of 200 acres and other property to his wife. After the settlement the children of the couple took sides between the father and mother, so that the mother favored some of the children, and the father favored those who took his side in the controversy. The father made a deed to a daughter Mrs. Ahrling, another deed to Mrs. Bell, wife of plaintiff in error, which mentioned considerations of \$5000. These





deeds were gifts and the considerations mentioned were neither paid nor to be paid. The sum of \$2000 mentioned in the deed of December 31, 1908, to be paid to Mrs. Wiest was a gift to her. The evidence of a number of witnesses shows that the deceased frequently had said that he had given the property to the children to whom it was deeded, and that he had provided in the deed for his support.

There is no covenant in the deed of December 31, 1908, under which the grantees by the acceptance of said deed agreed to pay the sum of \$5000 mentioned in that deed, but by making the deed the grantor acknowledged the receipt of such sum. The only payments to be made under the covenants in the deed are the payments therein stipulated to be paid by the grantees. The only payments stipulated to be paid are the sums of \$1000 by each of the grantees to Mrs. Wiest; the \$1700 mortgage; the semi annual payments by each of them of \$125 during the life of the grantor, and the expenses incurred by his sickness, if he should be unable to meet such expenses. The \$5000.00 mentioned as a consideration is not stipulated to be paid. It was a gift and appellant is not entitled to any foreclosure therefor.

(Page 3)

Defendant in error, John A. Egelhoff introduced in evidence a receipt for \$125 bearing date April 1, 1912, signed by John Egelhoff which recites that he had that day received from John A. Egelhoff \$125 in full of all accounts to date and a check executed by him payable to the order of John Egelhoff dated December 6, 1913, for \$25 which is endorsed by John Egelhoff and has written in the corner of it "In full of all accounts to date." There was also introduced in evidence a note dated January 2, 1911, for \$400 payable to the order of John A. Egelhoff one year after date and executed by John Egelhoff. This note bears the following endorsements: "In lieu of agreement dated Dec. 31, 1908." Received on within note one hundred dollars, September 16, 1911; \$125 October 1, 1912, and \$75 October 9, 1913. No objection was made to the admission in evidence of the note with the endorsements.

The evidence also shows that John Egelhoff boarded with Mrs. Groppel at \$5 per week, and that shortly before his death he had said that they had not settled for some time and he did not want to ask her for money because he believed he owed her.

The clause in the deed which provides for the semi-annual payments also provides that on the death of John



Egelhoff "the grantees shall be released from all further liability as to any payments whatever," is a release of the semi-annual payments that had not matured at his death. It is a declaration of the rule of law that if an annuitant dies before the day of payment his representatives cannot claim any portion of the annuity for the current term. 3 Corpus Juris 217; 2 R. C. L. 11.

The record also shows that John A. Egelhoff and Magdalena Groppe were each cited, on the motion of plaintiff, in error, to appear in the county court to disclose assets belonging to the estate of John Egelhoff and on a hearing were discharged and the citations dismissed.

The finding of the trial court that the defendants in error are not indebted to the estate in any of the matters alleged in the

(Page 4)

bill is sustained by the evidence.

The decree dismissing the bill for want of equity is correct and is affirmed.

Decree Affirmed.

(Page 5)





16/17  
2773  
Gen. No. 6584. October Term, A. D. 1916. Ag. No. 81.

People of the State of Illinois,

Defendant in Error,

vs.

Johanna Unkel, Plaintiff in error.

Error to County Court

Vermilion County

204 I.A. 620

Eldredge, J.

Plaintiff in error was convicted under the 4th count of an indictment charging her with keeping a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking and other misbehavior, and was fined \$150 and costs. The evidence of the People rested wholly upon the testimony of three detectives who visited the boarding house kept by plaintiff in error, which, if believed by the jury, was sufficient to sustain the conviction. The facts testified to by these witnesses were denied by Mrs. Unkel but it was for the jury to determine what credit should be given to the testimony of the different witnesses and only when the record shows that the verdict is clearly against the manifest weight of the evidence, can this court assume that duty. Complainant is made of the admission of some of the evidence but the evidence referred to was of such small importance and had so little bearing on the case that its admission if erroneous was not reversable error.

The judgment is affirmed.

(Page 1)



116/17  
2777  
Gen. No. 6594. October Term, A. D. 1916. Ag. No. 9

E. C. Creamer, Plaintiff in Error.

vs.

John Schmidt, J. F. Messman and John  
Henry, Defendants in Error.

Error to Circuit Court  
Champaign County

204 I.A. 62

Eldredge, J.

On June 4th, 1914, a petition was presented to the Commissioners of Highways of Pesotum township, Champaign County, signed by the requisite number of land owners, praying that a new road 40-feet wide be laid out on the section line between Sections 2 and 11 in said township. The route of the proposed road ran across the lands of the plaintiff in error and also across the right of way of the Illinois Central R. R. Co. The Commissioners, upon receiving the petition, fixed the day of September 5th, 1914, as the time when they would examine the route of such road and hear reasons for and against the laying out of the same. They gave 10 days notice of the time and place of such hearing by posting notices in 3 of the most public places in the town in the vicinity of the road to be laid out, in accordance with Section 76, Chapter 121, R. S. Sections 103 and 104 of said Chapter, however, required that similar notices should be served on any railroad company across or along the side of whose railroad it may be proposed to locate a public road, by delivering a copy thereof to the station agent nearest to the proposed location of said road. The Commissioners neglected to serve such notice on the agent of the Illinois Central Railroad Co. At the meeting held on September 5, 1914, the plaintiff in error was present and objected to the granting of the prayer of the petition.

(Page 1)

The Commissioners, however, decided to lay out the road and entered an order to that effect. Nothing further was done in regard to the matter until January 5th, 1915, when the Commissioners having come to the conclusion, that the order entered by them September 5th, 1914 granting the prayer of the petition and ordering the road to be laid out, was void for the reason that they had failed to serve any notice on the Illinois Central R. R. Co., in accordance with the provisions of the statute above mentioned, and passed a resolution declaring that said order be vacated and also entered a new order for another preliminary meeting to be held January 23rd, 1915. Proper notices of this meeting were posted and also served upon the agent of the Railroad Company in accordance with the provisions of the statute. On January 23rd the prelim-



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two to three

A. Smith

inary meeting was again held and an order entered granting the prayer of the petition and ordering the road to be laid out. The survey of the proposed road having been completed, and the Commissioners having failed to agree with plaintiff in error upon the amount of damages that the latter should have for the taking of his land, within 10 days of the date of the meeting filed a certificate with a Justice of the Peace for the purpose of having said damages assessed by a jury, and plaintiff in error was served with a summons to appear before said Justice on February 2nd, 1915, the date fixed for the hearing on this question. He appeared before the Justice and objected to the proceeding on the ground that the Justice had no jurisdiction because the certificate of the Commissioners was not filed with the Justice within 10 days from the 5th day of September 1914, the day that the petition was first heard. The objection was overruled and the parties proceeded with a trial which resulted in the assessment of damages for plaintiff in error in the sum of \$800. Plaintiff in error prayed an appeal from the judgment before the Justice to the County Court, where, upon another trial, his damages were assessed at \$700. Thereupon plaintiff

(Page 2)

in error made a motion for a new trial which was granted, after which he dismissed his appeal.

Plaintiff in error then filed his petition in the Circuit Court praying that a writ of certiorari issue, directed to the Commissioners of Highways of said town, commanding them to make return of the record in said proceedings. The writ was issued and served and the Commissioners made their return. The plaintiff in error then moved that said return be quashed. The Circuit Court after a hearing upon the matter denied the motion to quash the return and entered judgment quashing the writ.

It is first insisted by plaintiff in error that the provision of the statute requiring the certificate for the assessment of damages to be filed with the Justice of Peace within 10 days of the date of the order laying out the road is mandatory, and that the Commissioners having ordered the road to be laid out on September 5th, 1914, and having failed to file said certificate with the Justice within 10 days from that date, they lost all jurisdiction of the matter and the order for the laying out of the road, and the assessment of damages to the plaintiff in error, were void and of no force or effect. We cannot agree with this contention. The record fails

[illegible]

to show affirmatively that any notice had been served upon the agent of the Railroad Company prior to the meeting of September 5th, 1914 as required by the statute. The statutory provisions as to the notice of proceedings to lay out a road are mandatory and jurisdictional and unless complied with, the Commissioners have no authority to act, and any action so taken is without jurisdiction and void. No notice having been served on the Railroad Company, the Commissioners, had no authority or jurisdiction to enter the order of September 5th, 1914. The attempted proceedings had at that time were a nullity and had no more effect than if they had never taken place, as the Commissioners had no power to proceed to enter an order to lay out the road

(Page 3)

at that time.

Matthiessen v. Ott, 263 Ill., 569 and cases cited. The resolution passed by the Commissioners January 5th, 1915 by which it was attempted to vacate the order of September 5th, 1914 is of no importance as it was simply an attempt to vacate an order which in law did not exist. All the subsequent proceedings of the Commissioners from September 5th, 1915 were entirely regular and in accordance with the statutory requirements.

It is next urged that the Justice of the Peace had no jurisdiction to hear the assessment of damages for the reasons, first, that the year on the date of the summons was omitted therefrom; and, second, that the Justice did not write the words "Justice of the Peace" after his name when he signed the summons. Whatever force this contention may have it can only go to the jurisdiction of the person of plaintiff in error. The Justice acquired jurisdiction of the subject matter when the certificate of the Commissioners was filed with him. Plaintiff in error appeared before the Justice personally on the trial, prayed an appeal to the County Court, appeared in that Court personally on another trial, made a motion for a new trial, which was granted, and then dismissed his appeal. By these acts he certainly submitted his person to the jurisdiction of the court.

Complaint is also made that on the dismissal of the appeal no **procedendo** was awarded and that plaintiff in error cannot avail himself of the judgment in his favor for the damages awarded before the Justice. Plaintiff in error dismissed his own appeal and if he had desired a **procedendo** to have been issued all he would have had to have done was to have made a motion to that effect and it would have been awarded. A **procedendo** may be issued at any time upon motion of either party.

The judgment of the Circuit Court is affirmed.

(Page 4)



to the fact that the Commission had no power to

(8, 92, 11)

2775

Gen. N. 6599.      October Term, 1916.      Ag. No. 12.

Claus Tomhave,      Appellant.

vs.

Richard H. Vortman,      Appellee.

Appeal from Circuit Court  
Morgan County

204 I.A. 623

Eldredge, J.

Appellant sued appellee in an action of trespass for the cutting of osage orange hedge trees owned by the former. The pleas of general issue and **liberum tenementum** were filed to the declaration. The cause was tried before the court without a jury and judgment rendered for appellee.

The appeal from this judgment was originally taken to the Supreme Court, but was by that court transferred to this court for the reasons stated in the opinion, Tomhave vs. Vortman, 274 Ill. 28, which is referred to for a statement of facts and the issues involved.

The proofs showed that the hedge in controversy was six feet within the line of appellant's land which appjoined the land of appellee located on the east side thereof. There had originally been a wooden fence on the line between the two tracts and the hedge was planted by appellant's predecessor several feet west of the fence. When the wooden fence ceased to exist is not shown by the proofs. Appellee claimed that he had a license to cut the south half of the fence for poles or posts. This contention is based upon an alleged conversation between appellant and appellee had in 1905 shortly after appellant bought the land, in which appellee testifies that appellant told him that they would leave the hedge standing there and let it grow up for posts and each take one half. There was no plea of license but it is insisted by

(Page 1)

appellee that both parties tried the case in the court below upon the theory that all evidence of justification should be admitted irrespective of the pleadings, and therefore appellant is now estopped from asserting that the defense of license could not be made on the ground of the lack of a plea putting that question in issue.

Even if it be assumed that the case was tried upon the theory mentioned and a plea of license was thereby waived, there is no proof of any such license. The conversation referred to, which is denied by appellant, was at most but a promise by appellant in effect that when the hedge grew up sufficiently he would give appellee half of the posts. The language used can not be

Jan. 10, 1910. Chicago, Ill. No. 12

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 10th inst.

and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

5081 1708

The same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,  
Yours very truly,  
J. H. [Signature]

I am, Sir, very respectfully,  
Yours very truly,  
J. H. [Signature]

I am, Sir, very respectfully,  
Yours very truly,  
J. H. [Signature]

I am, Sir, very respectfully,  
Yours very truly,  
J. H. [Signature]

I am, Sir, very respectfully,  
Yours very truly,  
J. H. [Signature]

I am, Sir, very respectfully,  
Yours very truly,  
J. H. [Signature]

construed to mean that appellant gave appellee any permission to cut the trees at all, and much less to cut them whenever he saw fit so to do. Moreover, when appellant saw appellee starting to cut the trees he notified him that he was committing a trespass and ordered him to stop. This was a revocation of the supposed license if it ever existed. Such a license carries no interest in the realty, and is revocable at the will of the person who grants it. *Ragin v. Stout*, 182 Ill. 645. If the defense of license was properly an issue the judgment is erroneous, first because there was no evidence to sustain such a defense, and second, because even if there had been originally such a license it was subsequently revoked.

The judgment is reversed and cause remanded.

(Page 2)



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The information is provided for your reference only.

(S. 5169)

2776  
Gen. No. 6602, October Term, A. D. 1916. Ag. No. 15.

Anna M. Niederer, Appellee,

vs.

Edward H. Niederer Appellant.

Appeal from Circuit Court Cass County

Eldredge, J.

204 I.A. 624

Anna M. Niederer, appellee, filed her bill in equity in the Circuit Court of Cass County in which it is alleged in substance that she, together with her brothers, Edward H. (appellant,) Arnold, John and Frederick and her deceased sister, Minnie, were on the first day of January, 1906, the owners in fee simple as tenants in common, subject to the life estate of their mother, of certain premises located in the Village of Chandlerville in Cass County; that said premises were improved by buildings used for business purposes and that all of said persons entered into the following written agreement:

"Whereas, certain of us have contracted for the enlargement and improvement of the brick building adjoining to us in Chandlerville; and whereas, some of us have not the ready money to pay for our share of such improvement.

We hereby agree to pay the cost of such improvement equally and we agree that such of us advance more than our equal share of such expense shall have a lien upon the interest of those who do not advance our share of such cost in said building and we agree that upon the completion of the work we will execute proper papers which will enable those who advance the excess of this share to be secured for the balance until the same is paid. And we further agree that the rents and profits of said buildings in the excess of such sums over mother's shall need for her support shall be applied upon the payment of such claims for advances aforesaid.

Arnold Niederer,  
Fred Niederer,  
Edward Niederer,  
Anna Niederer,  
John Niederer,  
Minnie Niederer."

(Page 1)

It is further alleged in the bill that appellee and her sister Minnie made the contemplated improvements and paid for the same; that subsequently Minnie died in January, 1907, testate leaving her surviving no husband and no children nor descendants of children, and by her last will, which was duly probated, devised and bequeathed to appellee all her property real and personal; that after said improvements were made, Frederick, conveyed all his interest in said premises to appellee and that by reason thereof and of the will of Minnie, appellee is now the owner of an undivided one half of said premises subject to said life estate; that Edward H., John and Arnold each own an undivided one sixth thereof subject



to said life estate; that John and Arnold have sold or are about to sell their respective interests in the premises to Edward H. without reimbursing appellee for their respective shares of the cost of said improvements advanced by her and Minnie; prays that an accounting be taken of the amount due to appellee from each of the defendants and that liens to secure the payments of such amounts be declared and foreclosed upon failure of defendants or either of them to pay the same within a reasonable time.

All the defendants defaulted except appellant and Frederick Niederer. Frederick Niederer filed an answer confessing the bill. The answer of appellant claims numerous items of set off for money loaned to appellee and for taxes and special assessments paid by appellant on lands in Mason County also owned by the parties to this suit as tenants in common. The answer also admits that John and Arnold have conveyed their interest in the premises to appellant and denies that he had any notice that said improvements were made. A general replication was filed to the answer. The decree found that appellee and her sister Minnie, pursuant to said agreement paid for improvements on the building in the sum of \$2697.94; that neither appellant, John nor Arnold had paid their shares of the cost; that appellee was the sole devisee and legatee under the will of Minnie Niederer,

(Page 2)

deceased, whose estate had been fully administered and settled; that there was due appellee from John and Arnold each one-sixth of the cost of the improvements or the sum of \$449.65 with interest at the rate of five per cent per annum from August 10th, 1906, the date of the last payment on the improvements, to January 10th, 1916, amounting to a total of \$661.34; that on an accounting with appellant there was due to appellee from him the sum of \$38.38; that a lien be declared and established in favor of appellee against the interests owned by John, Arthur and appellant respectively at the time the agreement was made; that unless the amounts mentioned were paid by the defendants named within a certain time said liens should be foreclosed as to such interests as might be in default.

It is first contended that the proof does not show that the payments for the material and labor which went into the improvements represented the fair cash, market value thereof. Without discussing the evidence on this question in detail we are satisfied that it was sufficient to establish these facts.





It is next urged that the court erred in allowing interest on the money paid. Interest was clearly allowable because the money was advanced by appellee for appellant's use. Chap. 74. Sec. 2 R. S.; Perrin v. Parker. 125 Ill. 201; Harvey v. Drew, 82 Ill. 606.

The fact that the decree permitted appellee to recover for the amount paid by her deceased sister Minnie is assigned as error, it being insisted that the executor of her will should have been a party complainant. The will made appellee the sole legatee and devisee. A chose in action is assignable in equity and will be enforced therein together with the lien securing it. Chicago Title & Trust Co. v. Smith, 158 Ill. 417.

It is also insisted that it was error to decree that the liens on the interests of John and Arnold be superior to and have priority over the deeds conveying their respective interests to

(Page 3)

appellant because appellant was an innocent purchaser without notice whether John or Arnold had paid their respective shares of the cost of the improvement and the liens thereby discharged. He was a party to the agreement and knew the improvements had been made and was bound to ascertain whether the interest purchased from his brothers were free from the liens created by the agreement.

The other errors argued relate solely to questions of fact on which there was a conflict of evidence and we are not disposed to disturb the findings of the Master and Chancellor in regard thereto.

The decree is affirmed.

(Page 4)

It is not argued that the deed given to the plaintiff in 1851 was void. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed.

The fact that the deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed, is not a defense to the claim. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed.

It is also argued that it was error to decree that the plaintiff was to have the interest of John and Anna, but the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed.

(Page 3)

The plaintiff bought the property in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed.

The other error argued relates solely to the fact on which the plaintiff was a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed. The deed was given to the plaintiff in 1851, and the plaintiff was not a party to the deed.

Change in regard thereto.

The decree is affirmed.

(Page 4)

6/17  
2778  
Gen. No. 6614. October Term, A. D. 1916. Ag. No. 27.

William A. Compton, Defendant in error,

vs.

Mary Pearl Compton, Plaintiff in error.

Error to Circuit Court  
McDonough County

204 I.A. 629

Eldredge, J.

William A. Compton, defendant in error, filed a bill for divorce from his wife, Mary Pearl Compton, plaintiff in error, in which it is alleged that the parties were married March 5, 1890, and lived together as husband and wife until October 23, 1912, when she willfully deserted him without reasonable cause for more than two years prior to the filing of the bill. Mrs. Compton filed an answer to the bill in which are set out facts tending to show that she did not willfully desert him without reasonable cause. She also filed a cross bill asking for a divorce from defendant in error on the ground of extreme and repeated cruelty. The acts of cruelty are specifically alleged in the cross bill and are in substance, that for 5 years prior to 1912 she was in ill health and desired to go to California for the benefit of her health; that defendant in error refused to furnish her with necessary funds so to do, whereupon she borrowed the money from her father and went to California; that upon her return therefrom, defendant in error refused to receive her back or allow her to remain in the house as his wife and that he was guilty of conduct making her life unendurable; that on two separate occasions, defendant in error struck her without any provocation and caused

(Page 1)

her to fall on the floor, thereby suffering great pain.

Defendant in error answered the cross bill and denied that his wife was broken in health for five years prior to 1912, but admits that there were times when she was not well during that period; admits that he refused to furnish her with necessary means to go to California and denies that she wanted to go there for her health but states that she went to visit her sister; admits that she received financial aid to go to California from her parents over his protest; denies that he refused to receive her back as his wife and denies all the acts of cruelty. Two issues of fact were submitted to the jury, one upon the original bill and one upon the cross bill. The court directed the jury to find a verdict upon the issue presented by the cross bill, that defendant in



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error was not guilty of extreme and repeated cruelty, and submitted the issue upon the original bill of the willful desertion of the wife, plaintiff in error, to be determined by the jury from the evidence. The jury found a verdict on this issue in favor of defendant in error. Thereupon the court entered a decree granting a divorce to defendant in error upon the original bill on the ground of desertion and dismissed the cross bill for want of equity.

The principal errors presented for review and relied upon for a reversal of the decree are, (1) the verdict of the jury on the issue tendered by the original bill is contrary to the evidence; (2) the court erred in directing the jury to find the issue upon the cross bill in favor of defendant in error; (3) the court erred in refusing to give certain instructions offered on behalf of plaintiff in error.

As to the first contention without attempting to detail the facts shown, it is only necessary to say that the evidence was sufficient to sustain the verdict of the jury upon the original bill.

From the evidence presented in this case the court did not err in directing the jury to find the issue under the cross bill

(Page 2)

in favor of defendant in error. What acts of cruelty will amount to a cause for divorce has been defined in one of the later decisions of the Supreme Court (*Trenchard vs. Trenchard*, 245 Ill. 313) as follows:

"What is meant by cruelty as used in our statute, has been the subject of consideration by this court in many cases and has been construed to mean physical acts of violence; bodily harm such as endangers life and limb; such acts as raise a reasonable apprehension of bodily harm and show a state of personal danger incompatible with the marriage state. Bad temper, petulance of manner, rude language, want of civil attentions or angry or abusive words, are not sufficient grounds for divorce for extreme and repeated cruelty."

The two acts of physical cruelty relied upon to show extreme and repeated cruelty come far from being within the above rule. The first one happened while the parties were on a visit to New York in 1901, concerning which Mrs. Compton testified as follows:

"The time in New York when he slapped me my sister and son were with me; I was getting breakfast and he was standing by ordering me and I told him I thought I could do that and he slapped me; he was angry when he slapped me; did not bruise me, but it smarted like everything for awhile;"

The matter was apparently treated by the parties



as a trivial affair for they lived together happily afterwards for many years and probably never would have thought of it again if the bill for divorce had not been filed. The act is denied by defendant in error, but if it ever did happen it was fully condoned by the future conduct of the parties. The second act of physical violence occurred in April, 1910, in regard to which Mrs. Compton testified;

"It was after I came from California, I tried to get the stick pin from him; he was in the dining room putting on the stick pin and I just grabbed it as he passed; I wasn't angry and don't think he was; it was done so quick I don't think we had time to get angry; that was the time he knocked me down; he just turned and hit me and I went down; I don't know yet whether he was angry; I grabbed his hand with the stick pin in it; he drew his hand back and I fell; don't think I screamed; I think our son heard me fall and came running down; he asked if Mr. Compton had knocked me down and he said no; I said why he did; my son started in on his father

(Page 3)

and they had a tussle; then pretty soon they quit; I heard his father say, you are breaking my finger, this was the time Mr. Compton's finger was broken;"

Her testimony does not show that defendant in error intentionally struck her or purposely knocked her down and it might reasonably be inferred that she attempted to grab the stick pin from his hand, in drawing his hand back to prevent her doing so, it accidentally struck her, and she did not attempt to say that he acted in anger. The court did not err in directing the verdict upon the cross bill.

It is contended that the court erred in refusing to give instructions numbered 1, 2, 3, 4, 5, 6, and 8, offered on behalf of plaintiff in error. There was no evidence on which to base refused instruction 1. Refused instructions numbered, 2 and 4, state, among other things, that if defendant in error consented to his wife leaving him then the desertion was not willful and without reasonable cause. These instructions ignore the undisputed evidence that the day after plaintiff in error left her husband, he wrote her a letter requesting her in most earnest terms to return and a short time thereafter sent a mutual friend to make the same request of her. Consent to a separation may be withdrawn at any time within the two years. *Albee vs. Albee*, 141 Ill. 550. Refused instructions 5 and 6 call attention to particular facts in the case. Refused instruction 8 refers to the credibility of witnesses and refusal to give it was not reversible error in view of the other instructions given.

There being no reversible error in the record a decree is affirmed.

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16/17  
2779  
Gen. No. 6615. October Term, A. D. 1916. Ag. No. 34.

The People of the State of Illinois,  
Defendant in Error.

vs.

Chris Jensen, Plaintiff in Error.

**Error to County Court DeWitt County**

Eldredge, J.

204 I.A. 630  
This is a writ of error to review the judgment of the County Court of DeWitt County wherein plaintiff in error was committed to the County jail for four months and to pay a fine of \$100 for contempt of court. This proceeding was commenced by a petition filed by Amelia Jensen, the wife of plaintiff in error. The petition avers that Amelia Jensen is the mother of Dexter, Albert and Esther Jensen, aged respectively, eleven, eight and five years, and that plaintiff in error is the father of said children; that at the November Term, 1914, of said court, and order was entered that Chris Jensen, the father, pay the expenses of boarding said children at the McLean county school for girls at Bloomington, said expenses not to exceed \$10 per month for each of said children; that on September 8, 1915, and order was entered in said court awarding the custody of said children to said petitioner but allowing said former order to remain in full force and effect except as to the change of the custody of the children; that said Chris Jensen has not paid any part of the amount except the sum of \$19 and that he wholly refuses to pay any further part of said sum; that petitioner has had charge and control of said children since the date of said

(Page 1)

last order and has paid all the expenses of the care and keeping of said children; that on October 13, 1916, said Chris Jensen came to the home of the petitioner in Paxton, Illinois, and forcibly took said Dexter Jensen out of her possession without her consent and took said Dexter away with him and now has her in his charge and control at some place to petitioner unknown; that a rule may be entered by said court on said Chris Jensen to show cause why he should not be found guilty of contempt of said order of court by the failure to pay said sum as ordered by the court and for forcibly taking said child from the possession of said petitioner.

The petition is signed by Amelia Jensen and to it is attached the following jurant, "Subscribed and sworn to before me this 15th day of October, A. D. 1916. Edward B. Mitchell, Notary Public." (Seal.) Plaintiff in error filed an answer to the petition in which he states that there was no valid order of the court forbidding

Filed for record in the District Court, 1st District, 1st Division, on the 10th day of October, 1900.

Filed for record in the District Court, 1st District, 1st Division, on the 10th day of October, 1900.

Witness my hand and seal of office this 10th day of October, 1900.

That I, the undersigned, being a Justice of the Peace in and for the County of Adams, State of Colorado, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the District Court, 1st District, 1st Division, in and for the County of Adams, State of Colorado, in Case No. 10,000, filed for record in the District Court, 1st District, 1st Division, on the 10th day of October, 1900.

(Signed)

That I, the undersigned, being a Justice of the Peace in and for the County of Adams, State of Colorado, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the District Court, 1st District, 1st Division, in and for the County of Adams, State of Colorado, in Case No. 10,000, filed for record in the District Court, 1st District, 1st Division, on the 10th day of October, 1900.

That I, the undersigned, being a Justice of the Peace in and for the County of Adams, State of Colorado, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the District Court, 1st District, 1st Division, in and for the County of Adams, State of Colorado, in Case No. 10,000, filed for record in the District Court, 1st District, 1st Division, on the 10th day of October, 1900.

him to take his own child to his home as charged in the petition; he is advised that Amelia Jensen, his wife, has paid the necessary expense of said children not paid by him and that such payments discharge the rule if any there was against him; that said child was taken to his home which is also the lawful home of said child and said Amelia Jensen; that the first order of the court if valid was vacated by the later order of the court awarding the custody of the children to his wife, and in effect awards the child to himself; that he is advised that the court is without jurisdiction to entertain these proceedings.

The court compelled plaintiff in error to answer certain written interrogatories in answer to which he stated his name was Christ Jensen, aged 34, residence Minonk. That after he was arrested he directed the child to be hidden, that he got the child in Paxton where Mrs. Jensen had taken her away from the school and brought her home on the train and that said child was glad to go home with him; that the means he used was to go down to Paxton and tell the child

(Page 2)

to come and go home after she told him her mother had said to her, "I wish your darn dad would come and get you;" that he took her August, 13th.

The petition of Amelia Jensen and the answer thereto and the answers to the interrogatories by plaintiff in error is all the evidence heard by the court. What the nature of the proceedings was in which the order committing the child to the school for girls was entered, or what the order itself was, or to whom the plaintiff was to pay the money while the children were at said school do not appear. The order taking the children from the custody of the school and giving them to the mother was not shown. If the original order directed the plaintiff in error to pay a sum not exceeding \$10 per month for the care of said children, yet what was actually charged for these expenses is not shown. Nothing is shown by the record in this case that the County Court had any jurisdiction to enter any of the orders mentioned. The evidence does not show that plaintiff in error had any notice of any order of the County Court giving the children into the care and custody of his wife. It is insisted by counsel for defendant in error, that the contempt is of a criminal nature. The commission of a criminal act infers a criminal intent. A person cannot be guilty of a criminal intent in the violation of an order of court of which he had no knowledge or notice. The record in this case is barren of the slightest evidence to support the order imposing the penalty of a fine and imprisonment upon the plaintiff in error for contempt of court and is therefor reversed and remanded.

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7/16/17  
2780  
Gen. No. 6618. October Term, A. D. 1916. Ag. No. 30.

W. H. Whitaker,

Appellant

vs.

T. W. Ginger,

Appellee.

Appeal from County Court  
Christian County

204 I.A. 632

Eldredge, J.

At the December Term, A. D. 1916, of the County Court of Christian County, judgment was entered by confession against appellee for the sum of \$766.35 and \$50 for attorney fees on a judgment note in the usual form bearing date September 8, 1915, for the principal sum of \$749.15 with 7 per cent interest payable to the order of H. M. Monroe and signed by T. W. Ginger, the appellee. The note states upon its face, "Secured by chattel mortgage" and was endorsed by H. M. Monroe. The note was assigned by Monroe to appellant for value before maturity and the judgment was confessed in favor of appellant. Upon motion of appellee the judgment was opened up, and upon being granted leave to plead he filed a plea of general issue with notice of the defense that the entire principal of the note was for usury. The facts are undisputed and it is conceded by appellant that the defense would be good as between appellee and Monroe, the original payee, but it is contended, it cannot be interposed against appellant because the note was assigned to appellant for value before maturity and without notice and he was not attempting to foreclose the chattel mortgage.

The case was tried before the court without a jury and judgment entered in favor of appellee.

Section 1 of "An Act to regulate the assignment of notes secured by chattel mortgages etc.," Chapter 95, R. S. provides "That all notes secured by chattel mortgages state upon their

(Page 1)

face that they are so secured, and when assigned by the payee therein named, shall be subject to all defenses existing between the payee and the payor of said notes the same as if said notes were held by the payee named therein, and any chattel mortgage securing notes which do not state upon their face the fact of such security shall be absolutely void." The question in controversy is settled by the case of Hogan vs. Akin, 181 Ill. 448, where a construction of this statute was directly involved and in the opinion in that case it was held, "Under the law a chattel mortgage has never been assignable so as to vest the legal title in the assignee, and the mortgage is subject to defenses in the hands of



such assignee. The note, however, could be transferred before maturity, so as to cut off defense, and the object of the act is to destroy the negotiability of the notes of tha class, so that, in case of assignment, the assignee would not have rights that the payee would not have."

By the endorsement on the note of the fact that it was secured by chattel mortgage, the assignee was notified that the note was subject to all the defenses that existed between the maker and the payee at the time of the assignment, and he is not a holder without notice of the defenses thereto.

The judgment is affirmed.

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2781  
4/10/17  
Gen. No. 6622. October Term, A. D. 1916. Ag. No. 33

Mary C. Gordin and Edward B. Gordin,  
Executors of the Estate of Hannah J.  
Martin, deceased, Appellees.

vs.

G. W. Karr, Executor of the estate of  
Josephus Martin, Deceased, Emma B.  
Collison, Mary E. Collison, Effie Ireland,  
Edna Duncan, Walter Karr, Charles  
Karr, Appellants.

204 I.A. 63

**Appeal from Circuit Court  
Ford County**

Eldredge, J.

This suit was originated by a bill in chancery filed by Hannah J. Martin in her life time against Fred Collison and G. W. Karr as executors of the will of Josephus Martin, deceased, and certain children and grandchildren of the testator, the same being the devisees and heirs of the deceased, to set aside an ante-nuptial contract entered into by the said Hannah J. Martin (then Hannah J. Amm) and Josephus Martin, September 4th, 1894.

The original bill averred that Hannah J. Martin was married to Josephus Martin, September 5th, 1894 at Paxton, Illinois, and that after her engagement to Josephus Martin, and on the day before the marriage, she and Josephus entered into an ante-nuptial contract for the purpose of making suitable provision for her in the event she should survive him. The bill further averred in substance that Josephus represented to her that he was a man of some property but not of much wealth; that he desired to make provision for her in such amount according to his estate as would be consistent with the property owned by him and fair to her; that she relied upon the fair-

(Page 1)

ness of Josephus and believing in his representations that the provision made by the agreement was fair and just to her, she joined with him in its execution; that said representations were untrue and that said Josephus was, in fact, a man of great wealth owning farm lands in Illinois of the value of \$100,000 and personal property of the value of \$75,000 of which she only learned after the marriage; that she was induced to sign the agreement by fraud and deceit and that the provisions therein contained were grossly disproportionate to the amount that she would have been entitled to by law and were grossly inadequate. The bill prayed that the

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The New York Public Library, Astor Lenox Tilden Foundation, is a non-profit organization that provides access to a vast collection of books, manuscripts, and other cultural resources. The library is located in the heart of Manhattan, New York City, and is open to the public. It is a place where people can come to learn, to explore, and to discover. The library's collection is one of the most comprehensive in the world, and it is a treasure trove for researchers, students, and anyone with a passion for knowledge. The library's mission is to provide access to this collection for all, and it is a place where the power of knowledge is shared. The library's collection is a reflection of the human experience, and it is a testament to the power of the written word. The library's mission is to provide access to this collection for all, and it is a place where the power of knowledge is shared.

THE NEW YORK PUBLIC LIBRARY

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agreement be set aside as invalid and that she be awarded her interest under the statute. Upon a hearing had upon the bill, answer, replication, and the master's report, a decree was entered from which an appeal was taken to the Supreme Court and the opinion rendered therein will be found in Martin vs. Collison, 266 Ill. 172. Reference is made to that opinion for a statement of the issues and facts as they then appeared. In that opinion it was held as follows:

"Our conclusion is, that the evidence does not support the finding of the Chancellor that a confidential relation existed between the parties at the time the ante-nuptial agreement was executed, and it is therefor unnecessary to pass upon other questions raised and discussed in the pleas.

The decree is reversed and cause remanded."

Upon the filing of the remanding order in the Circuit Court on January 14th, 1915, the defendants to the bill (appellants here) entered a motion for a decree dismissing the bill for want of equity in accordance with the opinion and findings of the Supreme Court, and the complainant entered a cross-motion to refer the cause again to the Master for further testimony. The defendant's motion was overruled, the cross-motion was allowed and the cause again referred to the Master to take additional testimony. The complainant, Hannah J. Martin, died June 2nd, 1915, and the defendants then filed a plea in abatement setting up that fact and averring that by reason thereof,

(Page 2)

the cause of action, if any, abated, which plea the court held to be insufficient. Leave was then granted to Mary C. Gordin and Edward B. Gordin, executors of the will of said Hannah J. Martin, deceased, to be substituted as complainants and to file an amended bill. The amended bill sets out the death of Hannah J. Martin and the appointment of the said executors of her will, and then avers that in July on August 1894, Hannah J. Martin (then Hannah J. Amm) and Josephus Martin became engaged to be married and that by reason thereof the relations between them were of a confidential nature; that after the said engagement they entered into the ante-nuptial contract in question, and were afterwards married and lived together as hus-





band and wife until the death of Josephus on January 6th, 1908; that Josephus left a will which was duly probated and the said Hannah, the widow of the testator, renounced the provisions of the will in her favor; that at the time the ante-nuptial contract was entered into Josephus owned 1600 or 1700 acres of land worth \$100,000 besides his homestead of the value of \$3500; and that he also owned personal property of the value of \$50,000; that the provisions made by the ante-nuptial contract for the intended wife were meagre and grossly disproportionate to the wealth of the said Josephus; that he did not make known to her the nature, amount or value of his property before the ante-nuptial contract was entered into and that she did not know nor was she so situated that she reasonably should have known the true facts in regard thereto and that said contract was fraudulent and void; that said Hannah became entitled to her widow's award and her rights in the real and personal estate of the deceased as such widow in accordance with the statute.

To the amended bill a demurrer was interposed on the ground that the cause of action abated on the death of Hannah and does not survive to her executors; that the right, if any, to have the ante-nuptial contract set aside was a personal right or privilege to said

(Page 3)

Hannah

which did not survive and could not be assigned or devised. The demurrer was overruled.

The defendants then answered the amended bill in which answer they admitted the death of Hannah but denied all the other averments of the bill, and alleged that the executors of the will of Hannah cannot maintain the suit because the right of action of Hannah, if any, had abated at her death and also that under the decision of the Supreme Court the complainants are not entitled to offer additional testimony and that no further proceedings should be had herein except to enter a decree dismissing the bill for want of equity. The answer also contains a general denial that the complainants are entitled to the relief prayed for or any part thereof.

The complainants excepted to that part of the answer to the effect that the cause of action abated and that the decision of the Supreme Court was **res adjudicata** and the bill should be dismissed for want of equity,



and the exceptions were sustained.

After taking additional testimony the Chancellor entered a decree in which he finds that the ante-nuptial contract was entered into **after** the parties were engaged to be married and that by reason thereof their relations at the time of the execution of said contract were of a confidential nature; that the provisions made for the intended wife were greatly disproportionate to the value of the property owned by Josephus; that the defendants have not proven by a preponderance of the evidence that the intended wife at the time of the execution of the contract, had full knowledge or reasonable means of knowledge of the nature, character and value of her intended husband's property, and that by reason of the failure to make such proof the contract is declared void and set aside; that said Hannah was sufficiently informed, or had an opportunity to be so informed, as to the nature, character and value of the real estate owned by Josephus when the contract in question was entered into; that upon the death of Hannah

(Page 4)

the  
suit abated in so far as it sought to have her dower in the real estate allowed and set off, but that it did not abate as to her widow's award and her interest in the personal estate, and it was decreed that the contract be set aside and that the executors of the will of Hannah J. Martin should pay to her the widow's award and one third of the personal estate owned by the deceased at the time of her death.

Josephus Martin was a farmer in Champaign County and at the time the contract was entered into, owned about 1700 acres of land, part of which he farmed himself and rented the balance. He moved to the city of Paxton in 1883 and after that time he rented all of his farm land. He had been married previous to his marriage with Hannah, and at the time of the death of his first wife in March 1894, had five children all grown and married, except one. Hannah J. Martin had also been married before, and at the time of her marriage with Josephus was a widow with four adult children, all of whom were married except one. The marriage took place September 5th, 1894 and she was at that time 49 years of age and Josephus was 62 years old. At the time





of, and for a number of years prior to her marriage with Josephus, she was living on a farm consisting of 160 acres of land in which she had a life estate and she also had some personal property which including bank stock and cash amounted to over \$11,000. The farm on which she was living at the time of her marriage, and in which she had a life estate, was located about 9 miles from the lands of appellant. There is very little proof that Josephus owned any personal property of any great value at the time of the execution of the ante-nuptial contract. Neither the Master nor the Chancellor made any finding as to the nature or value of the personal property owned by him at that time. The evidence tends to show that at about that time he had lost some money in speculations on the Board of Trade. There is no evidence that Josephus ever made any false statements to Mrs. Amm in regard to

(Page 5)

the extent of the property owned by him nor any evidence of any actual or intentional fraud in regard thereto on his part. Before his death he conveyed to several of his children and grandchildren about 1400 acres of his lands and Hannah joined with him in the deeds. These conveyances were made in 1902 and 1906. Hannah and her first husband, and Josephus and his first wife, were members of and attended the same church, lived and owned land in the same vicinity, and frequently visited with each other back and forth. Under these circumstances, in addition to the well known fact that in farming communities the amount of land owned by any one individual is generally common knowledge among his neighbors, makes it highly improbable that Hannah did not know substantially the amount of land owned by Josephus. The decree makes a finding that Hannah prior to the execution of the ante-nuptial contract, was sufficiently informed of the nature, character and value of the real estate owned by Josephus at that time or the circumstances were such that she had opportunity of being so informed.

The additional evidence introduced by appellees after the case was remanded, and by which it is sought to sustain the finding in the decree that Hannah and Josephus were engaged to be married prior to the execution of the ante-nuptial contract is in substance as follows: E. B. Gordin, who married a daughter of Han-



nah, testified that about the middle of July, 1894, Martin told him that he was going to marry Mrs. Amm. M. L. Funk, also a son-in-law of Hannah, testified that about the week before the marriage Martin told him that he and Mrs. Amm were going to get married. F. L. Wessland testified that he met Martin in town one day and told him he saw his horse down at some-crossing about one half mile south of Mrs. Amm's farm and that Martin laughed and said it would not be long before he would be married. The witness could not fix the date when this conversation took place. Nancy Stephens, a daughter of Josephus, who resides in Chicago, testified that on about the middle

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of August 1894, her father called at her home and told her that he was going to be married and that he wanted to speak to her about it; that he had talked to the rest of the children and they were all satisfied and he hoped she would feel all right about it; he said that it would not impoverish his children as he had it fixed with her; that it was Mrs. Amm whom he was going to marry; that he had arranged the property matters so that it would not impoverish any of the children. A Mrs. Cooper testified that she was riding on a train going to Kankakee and that Martin was also on the train and he came to her and asked her if she would hold a couple of sticks while he pulled; that if he got the short one he would be married in September and if he didn't he would have to wait until she got ready; she could not tell who pulled the sticks; that he went into the back part of the train and brought Mrs. Amm forward; there was no talk there about what was being done; Martin said he was going to marry Mrs. Amm; witness could not fix the time when this took place.

Appellants insist that Hannah Martin having died her children as her heirs became directly interested in the litigation and incompetent as witnesses, and that the witness Gordin, the husband of one of her daughters, and Wessland, the husband of another likewise became incompetent to testify. The testimony of these two witnesses was taken before Mrs. Martin died but after her death appellants made a motion to exclude it on the grounds stated above which the court refused to do. Without passing upon this question it is sufficient to say





7/16/17  
2782  
Gen. No. 6628. October Term, A. D. 1916. Ag. No. 33.

Harley E. Shride, Appellant,

vs.

Estate of Wm. P. Abraham, Appellee

Appeal from Circuit Court  
Shelby County.

204 I.A. 634

Eldredge, J.

This is an appeal from the judgment of the Circuit Court of Shelby County rendered in that court on an appeal thereto from the Probate Court of said county, involving a claim of appellant for a one-fourth part of certain chattel property of his mother's (Sarah A. Abraham's) estate alleged to have been appropriated by Wm. P. Abraham, her husband, and never administered upon nor accounted for by said Wm. P. Abraham as executor of her estate. Wm. P. Abraham died in 1914 and this claim is filed against his estate. The amount of the claim is \$800 including interest. The claim was disallowed in the Probate and Circuit Courts.

Harley E. Shride, appellant, was the youngest child of Jacob C. Shride and Sarah A. Shride and was a minor until just before the date of the filing of the claim in question in the Probate Court. Jacob C. Shride, now deceased, died in 1901, testate, and by his will gave to his widow all his personal property and devised to her 80 acres of land as long as she remained his widow and 40 acres of land in fee and appointed her the executrix of his will. The land was subsequently sold to pay debts and the estate was settled. Sarah A. Shride, the widow of Jacob,

(Page 1)

married Wm. P. Abraham in 1904 at which time she possessed personal property consisting of corn, hay, horses, cattle, hogs, household goods, etc. amounting in value to between \$2500 and \$3000, and also about \$2500 in cash, being the balance of the sum realized from the sale of the real estate after the payment of the debts of her first husband's estate. When she married Abraham the farm chattel property was moved to Abraham's farm and the live stock mentioned was mingled with the live stock owned by Abraham and the grain and hay were mingled with that of Abraham and was fed to the live stock on the farm and sold and the live stock was sold by Abraham and his wife during her life time. The evidence shows that all the farm chattel property owned by Sarah A. Abraham at the time of her marriage to Wm. P. Abraham was mingled with that of her husband and was used and sold by them as one common property.



her death had the \$2500 in cash, no part of which represented the value of proceeds of the farm chattel property mentioned. She died testate, the provisions of her will being as follows:

"I Sarah Alice Abraham, of the age of forty-five years feeble in body but sound of mind and memory do hereby make the following my last Will and testament without any influence or suggestion on the part of any one interested or uninterested now or hereafter in this my will, to-wit:—

1st: I give to my husband Wm. P. Abraham six hundred dollars as my token of love and affection and help I received untiring, for doctoring and nursing through my long and severe sickness.

2nd: I give to my daughter Ora Bell Tolly and Thomas Edward Shride, my son, and Louis Maud Giles my daughter and Harley Ellsworth Shride my son, the balance of my estate consisting of nineteen hundred dollars to be divided share and share with my sons and daughters.

3rd: I appoint my husband, Wm. P. Abraham executor of this my will revoking all former will made by me."

Wm. P. Abraham as executor of his wife's will did not inventory any of the chattel property removed by his wife to his farm at the time of her marriage to him. The contention now is that

(Page 2)

said chattel property or the value thereof, notwithstanding that it was used, sold or otherwise disposed of during the lifetime of his wife, should have been accounted for by him as such executor as a part of her estate.

This chattel property as before stated consisting mostly of live stock and grain was intermingled, used and sold with the property of the husband and so used and sold by either him or his wife in and about the business of the farm and for the support of the family with the wife's knowledge and acquiescence. It is apparent from the terms of the will of Sarah A. Abraham that she no longer considered it as her undivided property and made no attempt to dispose of it therein. The money disposed of by the will was what she received from the sale of the real estate over and above the amount necessary for the payment of the debts of the estate of her first husband. It was held in the case of Reed vs. Reed, 135 Ill. 482.

"If a husband receives the capital fund of his wife's separate property, there is no presumption that she intended to give or transfer it to him \* \* \* but if the husband uses the property in his business or for the support of his family, with her knowledge and assent, a gift may be inferred in the absence of a contrary agreement."

In the case of Duval vs. Duval, 153 Ill. 49, the court





said:

"The proof shows that the proceeds of the sales of the property went into the hands of Thomas C. Duval, without objection from his wife; and the moneys were used in his business and in the support of his family with her consent. There is nothing in the evidence to show that the relation of principal and agent existed between Mrs. Duval and her husband, or that she regarded him as her agent. She never objected to the fact that the Samuelson notes were payable to his order, or to his collection of whatever principal and interest was paid thereon. If the husband uses the capital fund of his wife's separate property in his business, or for the support of his family, with her knowledge and assent, a gift may be inferred in the absence of a contrary argument. (Reed vs Reed, 135 Ill., 428)" The same rule was annuounced in Kahn vs. Wood, 82 Ill., 219 and Hawk vs. Van Ingen, 196 Ill., 20.

(Page 3)

The record is barren of any facts tending to show either expressly or impliedly that said chattel property was held in trust by Wm. P. Abraham for his wife. The evidence shows the claim to be without merit and the judgment is affirmed.

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2783

Gen. No. 6631, October Term, A. D. 1916. Ag. No. 42

Nicholas Berns,

Appellant,

vs.

Oscar S. Perry,

Appellee.

Appeal from Circuit Court  
Shelby County

204 I.A. 635

Eldredge, J.

On or about February 12th, 1914, Nicholas Berns, appellant, had a sale of certain personal property on his farm in Shelby County. Charles H. Perry is the son of appellee, Oscar S. Perry and bid in certain property at the sale. As part payment on the amount of the property so bid in by him, he offered to give his note with his father, appellee, as surety. The notes given by the purchasers at the sale were made payable to the Farmer's Bank of Ohlman. The cashier of the bank, H. A. Houseman, was present at the sale and acted as clerk. Houseman prepared the note for said Charles H. Perry who took it away for the purpose of obtaining his father's signature to it and brought it back to Houseman purporting to be properly executed by the son and his father. The note was for the principal sum of \$260.50, bore interest at the rate of 6 per cent per annum and was payable to the order of said bank ten months after date. The note also contained a provision that the makers thereof "Agree to pay all costs of collection or the same, including a reasonable attorney's fee to be entered as part of any judgment rendered on this instrument." The note was subsequently assigned to appellant by the bank. Appellant brought his action of assumpsit against Oscar S. Perry and Charles H. Perry to recover the amount of the note and interest. No service was obtained upon the son, Charles H. Perry and the case proceeded

(Page 1)

against appellee alone. Appellee filed a verified plea denying the execution of the note. Two trials have been had and on each a verdict has been rendered finding the issues joined in favor of appellee.

It is conceded by counsel for appellant that the evidence on the issue of whether the name O. S. Perry on the note was the genuine signature of appellee or whether it was a forgery is so conflicting that the verdict of the jury is conclusive upon that question, but it is insisted that the evidence of appellee alone shows conclusively as a matter of law that it was subsequently ratified by him. The testimony of appellee referred to is substantially as follows:

I first knew that my name was on this note  
along about harvest time in 1915. I knew





that my name was on this note before I went to Mr. Bern's house \* \* \* \* Some time about the 12th of June, I cannot remember the date, I think it was over there at Charley's I went in at the gate; there was a mail box out at the gate; as I went into the gate his mail box was there, and he got a letter from Ohlman, and I believe I opened it and I seen the statement there, and I says, who is on the note, and he says I signed your name to that note \* \* \* \* I heard the testimony of Nicholas Berns and remember having a conversation with him at his house in August, 1915. I had a conversation with him there. I spoke to Mr. Berns with reference to the note over at the bank. I told him that I wished that he would go over at the bank. I told about that note, that I wasn't acquainted with them, that the boy had threshed his wheat and he didn't have money enough to go around and that I did not, that I couldn't pay that debt and that I would see that he kept the interest paid up; Mr. Berns said that was all they wanted; that was about all that was said."

There was another conversation which took place in the home of appellee between himself, Houseman and appellant in October 1915, but as the different versions of that conversation between the parties are conflicting we must hold that the jury adopted that which was testified to by appellee.

The sole question presented for our consideration is whether the testimony of appellee above quoted established as a matter of law a ratification of his signature of the note. In

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many jurisdictions a forged instrument cannot be ratified, first, because it is a nullity and there can be no ratification of that which does not exist; and second, forgery being a crime, public policy forbids the ratification of the criminal act. In this state however it has been uniformly held that a forged instrument may be ratified either directly or by implication under certain circumstances. One can only be held to have made such a ratification when it is shown that he did so with full knowledge of all the material facts. *Fay vs. Slaughter*, 194 Ill. 157; *Chicago Edison Co. vs. Fay*, 164 Ill. 323; *Heffner vs. Vandolah*, 57 Ill. 520; *Livingston vs. Wiler*, 32 Ill. 387. It will never be implied from a doubtful state of facts. *Chicago Edison Co. vs. Fay*, *supra*; *Bulger vs. Gleason*, 123 Ill. App. 42; *Gleason vs. Henry*, 71 Ill. 109. It is apparent that appellee in his conversation with appellant did not promise to pay the note at any time, nor acknowledge the signature to be his, but in fact stated that he could not pay the debt. There is no evidence in the record that appellee knew the amount of the principal of the note, the rate of interest, the provision in regard to attorney's



fees nor any of the conditions of the note except that his name was supposed to be signed thereto. It is urged however that it was his duty to inform Berns at that time what purported to be his signature on the note was a forgery, and that having kept silent when he should have spoken, he is now estopped from denying the validity of the note. While it is true that a ratification may be implied from mere silence where the law required the party concerned to speak, yet this rule can only be invoked when the other party has been misled thereby and induced to do an act which he would not otherwise have done, or omits to do an act he would have done but for the conduct of such party and injury results therefrom. The doctrine of estoppel **in pais** is to prevent injuries arising from conduct or declarations which have been acted on in good faith and which would

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be inequitable to permit the party to retract. In order to create such an estoppel the party estopped must have induced the other party to occupy a position which he would not have occupied but for such acts and declaration and which also must be such as would ordinarily lead to the result complained of. *Hefner vs. Vandolah supra*. The evidence does not show, and there is no contention made, that appellant was induced to do any act which he would not otherwise have done, or omitted to do any act which he would have done, by the conduct of appellee, or that appellee's silence caused any loss or injury to appellant. Appellant is in no different position whatever than he would have been had appellee immediately told him that his signature on the note was a forgery.

No other errors are presented for our consideration and the judgment is therefor affirmed.

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2784  
Gen. No. 6638. October Term, A. D. 1916. Ag. No. 48

William T. Ross, Appellant,

vs.

Estate of James H. Ross, deceased,  
Appellee.

Appeal from Circuit Court  
Adams County

204 I.A. 636

Eldredge, J.

William T. Ross, the appellant, filed a claim against the estate of his father, James H. Ross, deceased, in the County Court of Adams County for the sum of \$626 for lodging, board and nursing of the deceased during his life time. The claim was disallowed in the County Court and an appeal was taken to the Circuit Court, where upon a trial, at the close of the evidence introduced by appellant, the court excluded the evidence upon the motion of appellee and directed the jury to find the issues joined in favor of appellee. Upon the verdict so found, judgment was rendered, to reverse which the appeal to this court is prosecuted.

James H. Ross, the deceased, died intestate, April 10th, 1915. The claim of appellant is for board, room and washing for his father from April 10th, 1910 to September 1st, 1912, and from June 27th, 1914 to December 24th, 1914 at \$4 per week, and for nursing the deceased from October 14th, 1914 to December 24th, 1914, at \$2 per week, making the total of \$626. James H. Ross in his life time was a farmer and in 1907 being left alone on the farm by the death of his wife, rented his farm and went to reside with appellant. From that time until his death he lived a part of the time with appellant and a part of the time at the homes of his

(Page 1)

other children. On December 24th, 1914, he was, upon inquest, declared to be a distracted person and a conservator was appointed.

There is no contention that there was any express contract between appellant and his father for the payment of the latter's board and lodging but it is claimed that there was some evidence tending to show an implied contract for such payment and that the court therefor erred in directing the jury to find its verdict in favor of appellee. During all the time mentioned, appellant was indebted to his father and on May 10th, 1909 evidenced the indebtedness by executing his promissory note payable to the order of his father for \$1095. A part of this note was paid and new note was given, November 20th, 1913, for \$900. The evidence further shows that during this period of time appellant used more or less of the crops raised on his father's farm. Nelson



Ross, son of appellant, testified that his mother became sick and was taken to a hospital in September, 1914, and about that time his grandfather told him in substance, that they were having bad luck, that he was boarding there off of then and he did not want to sponge off of anybody and that he always intended to pay for his board and lodging. Laura Ross testified to substantially the same facts. The witness, Calkins, testified that James H. Ross told him in 1911, that he generally paid his board wherever he stayed and that he never sponged off of anybody. George Tate testified that in 1912, in a conversation with James H. Ross, he remarked that it made it nice to have children to go to live with, and the latter replied, "Yes, but I intend to pay my way as I go." George Stillwell testified that James H. Ross told him in 1912, that he did not mean to sponge off of his children, that he paid his board where he was at. J. L. Miller testified that he is the cashier of the State Bank of West Point and James H. Ross gave him the note for \$1095 to collect from appellant and told him at the time he could waive the interest.

(Page 2)

Appellant paid \$100 on the note and gave the new note for \$900. He further testified that a few days thereafter, James H. Ross came to the bank and he told him, "Now these people are not satisfied with your settlement; I think they have paid you up absolutely all the money that your note shows to be due from them; now then you give me a check for \$100 which they paid you in excess of what you asked of them and let me make complete settlement over the matter between you." That Mr. Ross replied, "I stayed down there, I will settle that myself, settle any claim they may have." George Simmermacher testified that the day after the inquest he was at the home of appellant and in a conversation had between himself, appellant and his father, the subject of how long the father had lived with appellant was discussed and the father stated that he had lived with William 300 weeks and that he owed him for it. George Hartman testified that in March, 1915, which was after the conservator had been appointed, he went to the home of appellant to see him about some business and while there he had a conversation with appellant's father in which the latter told him that he owed appellant in the neighborhood of \$1200 and it was bothering him; that he would like to pay it but his hands were tied and he could not do it. The court sustained a motion to exclude all the evidence





of the witness Hartman on the ground that it was an admission made by a distracted person after inquest found and conservator appointed, and was therefor incompetent.

If there was any evidence in the record from which standing alone, the jury could, without acting undeseasonable in the eye of the law find that there was an understanding or agreement between appellant and his father, that the latter should pay for his board and lodging, then the court should have permitted the cause to be submitted to the jury. *Libby, McNeill and Libby vs. Cook*, 222 Ill. 206. The jury should have been allowed to pass

(Page 3)

upon the fact if, from an examination of the evidence admitted, it could not be said that there was no evidence or but a scintilla of evidence tending to prove appellant's claim. The evidence of the witness Simmermacher alone was sufficient for this purpose. The court considered the testimony of the witness Hartman incompetent on the ground that it related to a conversation had with Mr. Ross the day after he had been found to be distracted by the inquest. It seems to be conceded that the deceased was found to be a distracted person, although the proceedings in the County Court, which it is claimed resulted in the appointment of the conservator were not introduced in evidence. A witness is not rendered incompetent to testify merely because he has been found to be a distracted person and incapable of transacting his business affairs, neither would the admissions of such a person be incompetent for the reason. *Champion vs. McCarthy*, 228 Ill. 87. Even if a witness is insane, if such mental derangement does not affect the subject matter of the testimony either at the time of testifying or at the time of the occurrence, he is not incompetent. But in any event where an objection is made as to the competency of a witness to testify on account of his mental condition, the objection must be made before he has given any testimony, and it is for the court to decide upon the competency of the witness to testify, and the evidence in regard thereto should not in the first instance be taken in the presence of the jury. *People vs. Enright*, 256 Ill. 221. Of course, the same rule must apply where admissions made by such distracted or insane person are sought to be introduced.

For the errors indicated the judgment must be reversed and the cause remanded.

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2785  
Gen. No. 6642. October Term, A. D. 1916. Ag. No. 87.

Thomas D. Smith, Appellant,

vs.

Thomas Freeman and Martha Freeman,  
Appellees.

Appeal from Circuit Court Vermilion County.

Eldredge, J.

204 I.A. 638

Appellant sued appellees in an action on the case to recover damages for personal injuries received by him while working as a carpenter in the building of a porch for them. The declaration consists of one count in which it is charged in substance, that appellant on the 14th day of July, 1912, was employed by the defendants as a carpenter; that it was a duty of the defendants to furnish him with a reasonable safe place to work; that the defendants, not regarding their duty, furnished him a certain scaffold upon which he was directed to work by them and which scaffold was insufficient and not reasonably safe and while he was in the exercise of due care, said scaffold broke whereby he fell to the ground and was injured.

The evidence shows that the premises were owned by appellee Martha Freeman and that in the construction of the porch it was necessary to erect a scaffold on which to stand. This was done by nailing boards across two upright timbers. One of these boards appears to have been defective and broke while the plaintiff was standing thereon causing him to fall to the ground and to be somewhat injured. Thomas Freeman was the husband of Martha Freeman and was assisting appellant more or less in and about his work. Appellant testified that the board which broke had a knot in it and that Thomas Freeman had charge of the construction of the scaffold and he himself

(Page 1)

had no knowledge that the board was defective. The testimony of Thomas Freeman was to the effect that appellant himself made the scaffold and that all he, Freeman, did was to hold the two upright pieces which appellant nailed the cross pieces thereon. The evidence for appellees further tends to show that appellant was employed by Martha Freeman and that Thomas Freeman, her husband, who was seventy-five years of age, was simply assisting him in an incidental way and at the time of the injury was holding a board while appellant was standing on the scaffold nailing it to the frame of the porch. From the verdict rendered, the jury evidently found, either, that appellant constructed the scaffold himself or had full know-





ledge of its construction and condition before he went upon it and we can see no reason for disturbing this finding.

Some of the instructions are criticized, but taking them as a series the jury were fairly instructed as to the law and there were no errors in the giving of the instructions nor in the rulings on the admission of evidence of sufficient gravity to cause a reversal of the judgment and it must therefore be affirmed.

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There is no objection to the proposed change in the name of the company, the proposed change being in accordance with the wishes of the shareholders.

The Board of Directors of the company has decided to change the name of the company from the "New York and New Jersey Electric Light and Power Company" to the "New York and New Jersey Electric Light and Power Corporation".

(1901)

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2786  
Gen. No. 6643. October Term, A. D. 1916. Ag. No. 51.

George B. Jones,

Appellee,

vs.

William F. Gaumer,

Appellant.

Appeal from Circuit Court  
Edgar County

Eldredge, J.

204 I.A. 639

Appellee recovered a judgment for the sum of \$2,-250 in an action of assumpsit against appellant for damages resulting from a breach of contract for the exchange of real estate. Appellant in his argument has presented for our consideration but one of the errors assigned on the record, viz., that the verdict is contrary to the evidence. The evidence for appellee tended to show that he and appellant owned jointly about 790 acres of land in Mississippi, subject to a mortgage of \$11000 and accrued interest amounting in all to about \$12000; and that in February, 1912 they made a verbal agreement whereby appellee was to deed his undivided half interest in the Mississippi farm to appellant, or to a grantee designated by him, in consideration for which, appellant was to deed or cause to be deeded 80 acres of land, subject to a mortgage of \$2000, located in Green county, Indiana; that the deeds were prepared by or under the direction of appellant; that appellee executed his deed to his undivided half of the Mississippi farm to a grantee named therein, E. L. Scott; that at the same time appellant caused a deed to be delivered to appellee to the said 80 acre tract of land in Indiana subject to two mortgages each for \$2000; that appellee did not discover that the deed was subject to the second \$2000 mortgage until some time there after; after the discovery that his deed to the 80 acre tract of land was subject to two mortgages of \$2000 each instead of one, he complained to appellant about the matter and the latter

(Page 1)

thereupon signed a written agreement to furnish a deed for 120 acres of land in Green county, Indiana, subject to a mortgage of \$450 and in case he could not get a deed for this land, to convey to appellee, 120 acres of as good land in said county. The testimony of appellant was to the effect that the trade was made between appellee and Scott and that he had nothing whatever to do with it; that he intended to convey the 120 acre tract to appellee as a mere gratuity and that said agreement was without consideration. This position is so unreasonable that we can not give it credence but believe that the written agreement strongly corroborates the fact that the contract was made by ap-





pellee with appellant. Also as strongly corroborating the testimony of appellee that the 80 acre tract was to be subject to but one \$2000 mortgage is the evidence that the equity of appellee in the Mississippi farm was worth about \$5850, while the value of the 80 acre tract of Indiana land after deducting \$4000, the amount of the two mortgages thereon, was but about \$800. This shows such a disparity of value between the two tracts that it is unreasonable to presume that appellee would have made the trade had he known of the second \$2000 mortgage. In any event, however, the question at issue was purely one of fact within the province of the jury to determine, and as there is ample evidence to sustain the verdict the judgment will not be disturbed.

The judgment is affirmed.

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